TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 292.

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BLISH MILLING COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED NOVEMBER 27, 1915.

(24,450)

(24,450)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 706.

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BLISH MILLING COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1915.

1 GEORGIA,
Decatur County:

Be it remembered, That on the 23rd day of September, 1913, at the regular September Term of the City Court of Bainbridge, said County, before the Honorable H. B. Spooner, Judge of said Court, presiding, there came on to be tried the case of Blish Milling Company against the Georgia, Florida, and Alabama Railway Company, the same being a suit in trover. Said suit was filed on the 25th day of February, 1913.

Within the time allowed by law the defendant, the Georgia, Florida, and Alabama Railway Company, filed a demurrer, which demurrer coming on to be heard on the 23rd day of September, 1913, the same was overruled, and the Judge of the City Court of Bainbridge passed a judgment overruling said demurrer on each and all of the grounds therein contained. Whereupon the defendant had certified within the time required by law its exceptions pendente lite assigning error upon the overruling of said demurrer.

Said case regularly proceeded to trial, and after argument of counsel and the charge of the court, the jury returned a verdict in favor of the plaintiff and against the defendant for one thousand and eighty-four dollars and fifty cents ($1,084.50), and judgment was duly entered.

The defendant, the Georgia, Florida & Alabama Railway Company, thereafter in regular course and during said term, and within the time prescribed by law, filed its motion for new trial, which said motion for new trial was regularly passed and continued to the 4th day of February, 1914, at which time, in compliance with the orders of the court, the charge of the court was presented and approved, the brief of the evidence was agreed upon and approved, and the amended grounds of the motion for new trial were allowed and certified to be true, and all of said papers ordered filed as a part of the record in said case, and said motion came regularly on for a hearing on the 4th day of February, 1914, and the recitals of facts and the grounds of the motion for new trial were approved, allowed
2 and certified to be true, and the motion for new trial was, after argument, overruled and refused on each and all of the grounds therein stated.

To the judgment of the Court overruling and refusing said new trial the defendant then and there excepted and here and now excepts, and assigns error thereon, and says that the Court erred in overruling said motion for new trial on each and all of the grounds therein stated for the reasons therein stated.

The defendant assigns error on its exceptions pendente lite and says that the Court erred in overruling the demurrer in said case on each and all of the grounds stated in said demurrer, and says that said judgment overruling said demurrer was contrary to law, for the reasons assigned in said demurrer.

Defendant specifies the following portions of the record in said

case as material to a clear understanding of the errors complained of in this bill of exceptions:

The original petition in said case, and all amendments thereto;

The original demurrer filed in said case by the defendant;

The original plea and answer of the defendant, and all amendments thereto;

The exceptions pendente lite of the defendant to the order of the Court overruling the demurrer of the defendant, and the certificate and order of the Judge thereto;

The judgment of the Court overruling the demurrer;

The verdict of the jury;

The judgment of the Court based on said verdict;

The motion for new trial filed in said case, with the rule nisi and service thereon;

The brief of the evidence, with all orders and entries thereon;

The charge of the Court, with the approval of the Judge thereon;

The amended grounds of the motion for new trial, and the order and certificate of the Judge thereon;

The order of the Judge overruling and refusing the motion for a new trial.

And now within the time provided by law, and within thirty days of the entry of the judgment overruling and refusing said motion for new trial, comes the defendant, the Georgia, Florida, and
3 Alabama Railway Company, and names itself plaintiff in error and names the Bush Milling Company defendant in error, and tenders this its bill of exceptions and prays that the same may be certified as provided by law, in order that the errors complained of may be considered and corrected by the Court of Appeals of Georgia.

W. H. KRAUSE,
T. S. HAWES,
Attorneys for Plaintiff in Error.

P. O. Address, Bainbridge, Ga.

I do certify that the foregoing bill of exceptions is true, and specifies all of the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the City Court of Bainbridge, of Decatur County, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 6 day of February, 1914.

H. B. SPOONER,
Judge City Court of Bainbridge.

Due and legal service of the within bill of exceptions acknowledged, copy and all other or further notice or service waived.

This 6th day of February, 1914.

R. G. HARTSFIELD,
ERLE M. DONALDSON,
Attorneys for Defendant in Error.

P. O. Address, Bainbridge, Ga.

4 STATE OF GEORGIA,
Decatur County:

Clerk's Office, City Court of Bainbridge, said County.

I do hereby certify that the within and foregoing is the true original bill of exceptions as filed in this office in the case of Georgia, Florida & Alabama Railway Company plaintiff in error, vs. Blish Milling Company defendant in error, therein referred to; and that a copy thereof has been made and is now of file in my office.

Witness my signature and the seal of said Court hereto affixed this the eleventh day of February, 1914.

C. W. WIMBERLY, *Clerk.*

[Seal of the City Court of Bainbridge, Decatur County, Georgia.]

Filed in office this 6th day of February, 1914.

C. W. WIMBERLY, *Clerk.*

[Endorsed:] Case No. 5514. Court of Appeals of Georgia. March Term, 1914. Georgia, Florida & Alabama Ry. Co. versus Blish Milling Co. Bill of Exceptions. Filed in office Feb. 12, 1914. Logan Bleckley, C. C. A. Ga.

5 GEORGIA,
Decatur County:

To the City Court of said County:

The Blish Milling Company brings this petition against the Georgia, Florida and Alabama Railway Company, hereinafter denominated the defendant, and alleges the following facts:

1st. The defendant is a railway corporation organized under the law of the State of Georgia, and having its principal office and an office and agent in the City of Bainbridge and County of Decatur, and operating a line of railroad in the State of Georgia and said County.

2nd. On May 13th 1910, your petitioner delivered to the Baltimore and Ohio Southwestern Railroad Company at its station, Seymour, Indiana, loaded into car A. G. S. No. 8455, 480 12 lb. sacks, 300 19 lb. sacks, and 1,120 24 lb. sacks of copyright flour, for transportation to itself, Blish Milling Company, at Bainbridge, Georgia, at the same time taking from said railroad company a bill of lading for said shipment of flour, issued by its agent on said date, showing your petitioner to be the consignor and consignee of same, containing *instructing* to notify Draper-Garrett Grocery Company on arrival at destination, and the routing of said car over the L. & N., W. & A., C. of G. and G. F. & A. railroads, showing the defendant to be the delivering carrier. A copy of said bill of lading is hereto attached.

3rd. Said flour was delivered by connecting carriers to the defendant and transported to Bainbridge, the destination, arriving there on or about June 2, 1910.

4th. Said car load of flour was at all times the property of your petitioner and was sent to Bainbridge for the purpose of sale to the Draper-Garrett Grocery Company, and your petitioner's said bill of lading was attached to a draft on the said grocery company for $1,224.50, the value of said flour, and forwarded through its banking houses to Bainbridge for delivery to said grocery company upon the payment of said draft.

5th. Said draft was never paid by the said Draper-Garrett
6 Grocery Company, or any one else, and said bill of lading was never delivered to them or the defendant, but was returned to your petition- upon the nonpayment of the draft.

6th. The defendant after receiving said flour with instructions to notify Draper Garrett Grocery Company of its arrival, without the bill of lading for same having been surrendered to it, delivered your petitioner's said flour to the Draper Garrett Grocery Company in violation of defendant's duty and in defiance of your petitioner's right of property in said flour.

7th. Upon receipt of said car of flour the said Draper Garrett Grocery Company proceeded to and did unload a large portion of same into its warehouse, but afterwards reloaded it back into the car and tendered it back to the defendant.

8th. The defendant accepted said car back from the said Draper Garrett Grocery Company, and carried it to its own warehouse in Bainbridge where it caused it to be unloaded and separated into two portions, one of which defendant disposed of without notice to petitioner, the other being also disposed of by defendant.

9th. By reason of the facts aforesaid and the conversion of petitioner's property in said flour by defendant, the defendant has damaged your petitioner in the sum of twelve hundred, twenty-four and 50/100 dollars, the value of said flour as follows, and interest on said sum since June 2, 1910;

480	12 pound sacks copyright flour at $6.25.....		$187.50
300	19 " " " " " "	6.10	
1,120	24 " " " " " "	6.10.....	1,037.00
			$1,224.50

10th. Petitioner shows that all costs in the case of the Blish Milling Company vs. Georgia, Florida & Alabama Railway Company, which was filed in the office of the Clerk of the City Court of Bainbridge for Decatur County on the 14th day of February 1911, and dismissed, were paid before the filing of this suit.

Wherefore your petitioner prays for judgment against the defendant, the Georgia, Florida and Alabama Railway Company for the sum above stated and interest, and that process issue requir-
7 ing the defendant the Georgia, Florida and Alabama Railway Company to be and appear at the next term of the City Court of Bainbridge to answer your petitioner's complaint.

R. G. HARTSFIELD,
ERLE M. DONALSON,
Petitioner's Attorneys.

Copy of Bill of Lading.

Uniform Bill of Lading—Standard Form of Order Bill of Lading Approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

Baltimore & Ohio Southwestern Railroad Company.

Shipper's No. 1412.
Order Bill of Lading—Original. 825, Agent's No.

Received subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Seymour, Ind. May 13, 1910 from Blish Milling Company the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the original order bill of lading properly endorsed shall be required before delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading in writing by the shipper.

The rate of freight from Seymour, Ind., to —— is in cents per 100 lbs.:

		If special per —.	If special per —.
If — Times 1st—	If 1st Class.....	32.½	.....
8	If 2nd Class	If rule 25	If 3rd Class	If rule 26
	If rule 28	If 4th Class	If 5th Class	If 6th Class

(Mail Address—Not for purposes of Delivery.)

Consigned to order of Blish Milling Co. Destination, Bainbridge, State of Ga. County of —— 19652.

Notify Draper-Garrett Grocery Company at Bainbridge, State of Ga., County of ——.

Route L. & N., W. & A., C. of G., G. F. & A. at Cuthbert.

Car initial, A. G. S. Car No. 8455.

No. packages.	Description of articles and special marks.	Weight subject to correction.	Class or rate.	Check column.
480	12 lb. Sacks Copyright....	.....	.....	.....
300	19 lb. Sacks Copyright....	.....	.....	.....
1,120	24 lb. Sacks Copyright....	38,340	.....	.....

Received $—.
To apply to prepayment of charges on the property described hereon.

——— ———,
Agent or Cashier,
Per ——— ———.

The signature here acknowledges only the amount prepaid. Charges advanced.

If charges are to be prepaid, write or stamp here "To be prepaid."

E. MASSMAN, *Agent,*
Per ——— ———.

BLISH MILLING CO., *Shippers,*
Per J. H. HOLTMAN.

(This bill of lading is to be signed by the shipper and the agent of the carrier issuing same.)

SEC. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for difference in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehousemen only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the

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burden to prove freedom from such negligence shall be on the carrier or party in possession.

SEC. 2. In issuing this bill of lading this Company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

SECTION 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charge if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss damage or delay, must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

SEC. 4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be transported hereunder, shall have the privilege, at its own cost and risk of compressing the same for greater convenience in handling or forwarding, and shall be held responsible for deviations or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad public or licensed elevator may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car,
11 depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed and stored in a public or licensed warehouse at the costs of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held for forty-eight hours (exclusive of legal holidays) for loading or unloading, and may add such charge to all other charges hereunder, and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entitled at the risk of the owner after unloading from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or *or* other sidings, wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the public classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosures to the carrier of their nature, shall be liable for loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of
12 lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail to water route, which is provided for in Sec. 3, hereof if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters, or from explosion, bursting of boilers, breaking of shafts, or any latent defect in hull, machinery or appurtenances, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel

carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

SEC. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading shall be without effect and this bill of lading shall be enforceable according to its original tenor.

Endorsements: Blish Milling Company. J. H. Holtman,
13 Cashier. Filed in Office, February 25th, 1913. C. W. Wimberly, Clerk.

STATE OF GEORGIA,
Decatur County:

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY.

Complaint.

The defendant, the Georgia, Florida and Alabama Railway Company, is hereby required in person or by attorney to be and appear at the next term of the City Court of Bainbridge to be held in and for said County of Decatur on the Third Monday in March next then and there to answer the plaintiff's demand in an action of Complaint, as in default thereof the court will proceed as to justice shall appertain.

Witness the Honorable H. B. Spooner Judge of said Court this the 25th day of February 1913.

C. W. WIMBERLY, *Clerk.*

GEORGIA,
Decatur County:

I have this day served a true copy of the within original petition and process on the Georgia, Florida and Alabama Railway Company, a corporation by serving the same on R. B. Coleman, personally, its agent and General Manager.

This 1st day of March, 1913.

J. H. EMANUEL,
Sheriff City Court of Bainbridge.

14 City Court of Bainbridge, March Term, 1913.

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY.

Complaint.

Now comes the defendant, and before pleading, demurs to said petition, and for demurrer says:

1st. That the petition shows that the City Court of Bainbridge is without jurisdiction of the subject matter of this cause of action, the cause of action being a contract of bailment, entered into by and between the Blish Milling Company and the Baltimore and Ohio Southwestern Railway Company.

2nd. The petition sets up no cause of action against this defendant.

3rd. The petition does not show any right in the plaintiff named therein to bring this suit.

4th. Said suit being a suit in trover and the petition not showing that the bailment is waived, and the property not being in the hands of nor suit filed against either party to the contract, the suit will not lie.

And for these reasons defendant says that said petition should be dismissed.

T. S. HAWES,
Defendant's Attorney.

After argument had, it is adjudged by the court that said demurrer be overruled on each and every ground thereof.

This September 22, 1914.

H. B. SPOONER,
Judge City Court of Bainbridge.

Filed in office this 15th day of March, 1913.
C. W. WIMBERLY, *Clerk.*

15 City Court of Bainbridge, March Term, 1913.

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY.

Complaint.

Now comes the defendant, and subject to its demurrer heretofore filed, for plea and answer to said petition says:

1st. Defendant admits the first paragraph of said petition.

2nd. For lack of sufficient information defendant can neither admit nor deny the second paragraph of said petition.

3rd. Defendant denies the third paragraph of said petition.

4th. For lack of sufficient information defendant can neither admit nor deny the fourth paragraph of said petition.

5th. For lack of sufficient information defendant can neither admit nor deny the fifth paragraph of said petition.

6th. Defendant denies the sixth paragraph of said petition.

7th. Defendant denies the seventh paragraph of said petition.

8th. Defendant denies the eighth paragraph of said petition.

9th. Defendant denies the ninth paragraph of said petition.

10th. For lack of sufficient information defendant can neither admit nor deny the tenth paragraph of said petition.

11th. For further plea defendant shows that it never handled A. G. S. car No. 8455 loaded with flour or any other product from the Blish Milling Company. Defendant shows that it is defendant's information and belief that A. G. S. car No. 8455 never passed Atlanta, Georgia, at the time mentioned with the flour loaded therein by the Blish Milling Company, and shows that the seals of said car were broken by the Central of Georgia Railway Company at Atlanta, Georgia, and the flour removed from said car and placed in K. C. F. S. & M. car No. 27286, and defendant shows that if there has been any conversion of said property, the conversion was by the Central of Georgia Railway Company in Atlanta by the breaking of said seals and the removal of the contents of said car.

12th. For further plea defendant shows that on or about June 2, 1910, it handled K. C. F. S. & M. Car No. 27286, that said car was placed on the side-track of Draper-Garrett Grocery Company,
16 that the Draper-Garrett Grocery Company inspected said car, refused to accept the same, and defendant took charge of said car, notified Blish Milling Company that said car was on hand and tendered said flour, and each and every sack thereof which defendant had received, back to the Blish Milling Company, and defendant shows that at the time of said tender each and every sack of said flour was in the same car in which it had been received by this defendant and was in the same identical condition in which it had been received by this defendant. That the said Blish Milling Company refused to accept said flour, although the same had not been damaged or injured by this defendant, and this defendant then unloaded said flour into its warehouse, and, a portion thereof being damaged, to wit, eight barrels, the same was sold as perishable property, and the remainder of said flour was held for a period of six months, and, after being advertised in the manner required by law, the same was sold at public outcry.

13th. Defendant pleads that in the sale of said flour it gave the notice as required by the law of Georgia, that defendant received from the sale of said flour at public outcry the sum of one hundred and forty-seven dollars and fifty cents ($147.50). That the freight on said flour was one hundred and twenty-four dollars and sixty cents ($124.60), the demurrage was three dollars ($3.00), labor for unloading and stacking was one dollar and forty cents ($1.40), one hundred and seventy (170) storage in defendant's warehouse at one dollar ($1) per day was one hundred and seventy dollars

($170.00), making a total of two hundred and ninety-nine dollars ($299.00), and, deducting the amount of the sale of said flour of one hundred and forty-seven dollars and fifty cents ($147.50) leaves a balance due this company by the Blish Milling Company of one hundred and fifty-one dollars and fifty cents ($151.50).

14th. Defendant pleads that the Blish Milling Company never offered to pay the freight due on said flour or any of the charges assessed thereon, either before or since the filing of this suit, and pleads that they have not paid the charges on said flour.

15th. Defendant pleads that no demand was ever made by the Blish Milling Company on this defendant for said flour, but that on the contrary said Blish Milling Company refused to receive
17 said flour when this defendant tendered it to them. Defendant pleads that it tendered said flour to said Blish Milling Company within one week after the same was received by this defendant, and that no damage of any kind or character had occurred to said flour while it had been in the possession of this defendant.

16th. Defendant pleads that at the time said property was tendered back to the plaintiff that it was of the same, identical value that it was at the time it was received by this defendant, and that no injury or damage of any kind or character had been done to said flour since coming into the possession of this defendant.

17th. Defendant further pleads that said property came lawfully into the hands of this defendant, and if the facts in this case establish a conversion at all, that said conversion was purely and simply a technical conversion and that no damage occurred to said property as a result of said conversion, but that the same was tendered back to the plaintiff in identically the same condition as when received without loss, damage or delay, and the plaintiff refused to receive the same, and defendant pleads that said property being of the same value when it was tendered back as it was when it was received by this defendant, that the same should go in mitigation of any damages which the plaintiff has received as a result of said technical conversion.

18th. Defendant further pleads that if it is held that the defendant is the bailee and the plaintiff the bailor and that the acts of the defendant were in violation of the contract of bailment, that, nevertheless, said act of delivering said property or placing the same on the side-track adjacent to Draper-Garrett Grocery Company's warehouse did not injure or damage said property in any manner, shape or form, or in any degree, no matter how slight; that said property, when offered back to Blish Milling Company, was in the same condition identically as when originally received by this defendant, and that any act of this defendant in violation of the contract of bailment did not injure or damage the property bailed or the bailor.

18 19th. Defendant further pleads that the contract in this case was made under and by virtue of the laws of the State of Indiana; that said contract provides, "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of

the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." Defendant pleads that the common law being presumably in force in Indiana, that said provision of said contract is valid, and that even though the defendant converted said property and failed or refused to deliver the same, that the plaintiff would not be entitled to recover under its contract, unless it had filed notice in writing as required by said contract, and defendant specially pleads that no such notice has been filed, either written or verbal, and that this defendant has not waived the filing of any notice.

Defendant, having fully answered, prays to be discharged.

T. S. HAWES,
Defendant's Attorney.

Filed in office this 15th day of March, 1913.
C. W. WIMBERLY, *Clerk.*

19 City Court of Bainbridge.

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY.

Trover, etc.

Now comes the defendant and by leave of the Court first had and obtained, amends its plea in said case and says by amendment:

1st. For further plea defendant says, that the subject matter of this suit is a car of flour shipped from Seymour, Indiana, to Bainbridge, Georgia, and was an interstate shipment. That at the time of the alleged conversion the said shipment had not lost its interstate character, because it had never been delivered to the person to whom it was consigned, and said shipment being interstate it is controlled by the Federal statutes regulating interstate shipments by railroads, and that the defendant is not liable in trover under said acts of Congress.

2nd. That said shipment being interstate shipment is controlled by the Federal statutes controlling interstate commerce, and the bill of lading provides that written notice shall be given of every claim of loss or damage or failure to deliver, and that no such notice was given by plaintiff.

W. H. KRAUSE,
T. S. HAWES,
Att'ys for Defendant.

Amendment allowed in open Court, Sept. 22nd, 1913.
H. B. SPOONER,
Judge C. C. of B.

Filed in office Sept. 22nd, 1913.
C. W. WIMBERLY, *Clerk.*

20 *Complaint.*

City Court of Bainbridge, March Term, 1913.

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA, & ALABAMA RAILWAY COMPANY.

Now comes the defendant and before pleading to the merits of said case and at the first term of said court files this its plea in bar, and says:

1st. That the contract made and entered into by and between the Baltimore and Ohio Railway Company and the Blish Milling Company was made and executed at Seymour, in the State of Indiana, and under the laws of the State of Indiana.

2nd. That the common law is presumed to be in force and effect in the State of Indiana.

3rd. That said contract provides, "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." Defendant pleads that no claim of any kind has been filed in writing as required by said contract, and there being no claim filed as provided in said contract for failure to make delivery within the time required in said contract the plaintiff is forever barred from any rights arising under, by virtue of, or through said contract.

4th. Defendant pleads that said property was shipped from Seymour, Indiana, and the contract was made *and* on the 13th day of May 1910, and that said property was received at Bainbridge, Ga., on June 2nd 1910, and that the violation of the terms of said contract, if any occurred on June 2nd 1910, and that defendant breached said contract, if breached at all, on the 2nd day of June 1910, and failed to make delivery, if delivery was not made in compliance with the terms of said contract, on the 2nd day of June 1910, and that the time for filing claim for said failure expired on the 2nd day of October 1910, and that during said period
21 no claim was filed as required by said contract, by the Blish Milling Company or by any person for said Company, and for said reasons said suit is forever barred.

And of these things defendant submits itself to the Country.

T. S. HAWES,
Defendant's Attorney.

GEORGIA,
Decatur County:

Personally appears R. B. Coleman, who upon being duly sworn, deposes and says, that he is the General Manager of the Georgia, Florida, and Alabama Railway Compny, and as such is authorized

to represent said Company in the above stated litigation, and that the matters and things set forth in the above and foregoing plea are true.

R. B. COLEMAN.

Sworn to and subscribed before me this 15th day of March 1913.

E. S. VARNER,
N. P., Decatur Co., Ga.

Filed in office this 15th day of March 1914.

C. W. WIMBERLY, *Clerk.*

22 GEORGIA,
Decatur County:

In City Court of Bainbridge, September Term, 1913.

BLISH MILLING COMPANY
vs.
GA., FLA. & ALA. RY. CO.

Trover.

The court upon trial of said cause having overruled defendant's demurrer to the petition, the said defendant does except to said ruling, and assigns error thereon as contrary to law, and asks that said exception be noted and made a part of the record in said case. This September 23rd 1913.

T. S. HAWES &
W. H. KRAUSE,
Att'ys for Ga., Fla. & Ala. Ry. Co., Defendant.

I hereby certify as true the above exceptions pendente lite, and order that same be duly filed and made a part of the record. This September 25th 1913.

H. B. SPOONER,
Judge C. C. of B.

Filed in office Sept. 25th 1913.

C. W. WIMBERLY, *Clerk.*

23 We the jury find in favor of the plaintiff $1084.50 with 7% interest from June 3rd, 1910. 9/23/13.

J. C. GREEN, *Foreman.*

The jury having returned a verdict in favor of the plaintiff in the above and within stated case and against the defendant for the principal sum of ten hundred, eighty-four dollars and fifty cents, with interest at the rate of seven per cent. from the 3rd day of June, 1910. Judgment is hereby rendered by the court in

favor of the plaintiff, the Blish Milling Company, and against the defendant, the Georgia, Florida and Alabama Railway Company, for the principal sum of ten hundred and eighty-four dollars and fifty cents, ($1,084.50), and for the sum of two hundred and fifty dollars and nin-ty-one cents, ($250.91), as interest to the date of this judgment, and for all future interest on said principal sum at the rate of seven per cent. per annum, and for — dollars as cost of court.

Done in open court this 23rd day of September, 1913.

H. B. SPOONER,
Judge City Court of Bainbridge.

24 GEORGIA,
Decatur County:

In City Court of Bainbridge.

BLISH MILLING COMPANY
vs.
GA., FLA. & ALA. RY. COMPANY.

Verdict and Judgment for Plaintiff at September Term, 1913, of City — on 23rd day of September, 1913.

The defendant being dissatisfied with the verdict and judgment in said case comes during the term of the court, before the adjournment thereof and within thirty days from said trial, and moves the court for a new trial upon the following grounds, to wit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon *he* prays that these *his* grounds for a new trial be inquired of by the court, and that a new trial be granted *him.*

T. S. HAWES &
WILL H. KRAUSE,
Att'ys for Movant.

Read and considered, It is ordered that the plaintiff show cause before me at Bainbridge, Ga., at 10 o'clock on the 6th day of October 1913, why the foregoing motion should not be granted. It is further ordered that the plaintiff be served with a copy of this motion and order; and that this order act as a supersedeas until the further order of the court.

H. B. SPOONER,
Judge C. C. B.

The defendant having made a motion for new trial in said case, on the grounds therein stated, and said grounds having been approved by the court and it appearing that it is impossible to make out

and complete a brief of the testimony in said case before adjournment of court; It is ordered by the court that said motion be heard and determined on the 6th day of October 1913, in vacation at Bainbridge, Georgia, and that movant may amend said motion at any time before the final hearing. If for any reason this
25 motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at any time and place in vacation as counsel may agree upon, and upon failure to agree then at such time and place as the presiding judge may fix on the application of either party of which time and place the opposite party shall have at least five days' notice. If for any reason this motion is not heard and determined before the beginning of the next term of this court then the same shall stand on the docket until heard and determined, at said term or thereafter. It is further ordered that movant have until the hearing whenever it may be to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time either in term or vacation, and if the hearing of the motion shall be in vacation and the brief of evidence has not been filed in the Clerk's office before the date of the hearing, said brief of evidence may be filed in the Clerk's office at any time within ten days after the motion is heard and determined. This 23rd day of September 1913.

H. B. SPOONER,
Judge C. C. B.

Due and legal service of the within motion and order acknowledged, time, copy, and all other and further service waived. This 23rd day of September 1913.

R. G. HARTSFIELD,
ERLE M. DONALDSON,
Attys. for Plaintiff.

Filed in office this 25th day of September 1913.

C. W. WIMBERLY, *Clerk.*

The hearing of the within motion having been regularly continued and assigned for this date, and coming on to be heard by consent of counsel for both sides, and the charge of the court having been approved, the brief of evidence having been regularly presented and approved, and the amended motion for new trial having been allowed and the grounds certified to be true, and all of said papers being ordered filed as a part of the record in said case; and said motion for new trial being regularly argued, the same is refused
26 and overruled and the motion for new trial is refused. This February 4th 1914.

H. B. SPOONER,
Judge C. C. B.

27 *Complaint.*

City Court of Bainbridge.

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY.

Brief of Evidence.

Depositions of E. MASSMAN, for the plaintiff:

I know the Baltimore & Ohio Southwestern Railway Company and am connected with it as Freight and Ticket Agent at Seymour, Indiana, which position I have held for more than two years. I am able to identify the order notify bill of lading issued by the Baltimore & Ohio Southwestern Railroad on May 13th, 1910, for a carload of flour, consigned to Blish Milling Company, order notify Draper-Garrett Grocery Company, Bainbridge, Ga., the route being L. & N., W. A., C. of G., and G. F. & A. at Cuthbert, the car being A. G. S. No. 8455. I attach the original bill of lading and mark it Exhibit "A", issued to Blish Mining Company May 13th 1910, and the signatures on said bill of lading are genuine.

Plaintiff then introduced original bill of lading issued by Baltimore & Ohio Southwestern Railway Company to Blish Milling Company at Seymour, Ind., for 1,900 sacks of flour, contained in A. G. S. car No. 8455, dated May 13th, 1910, consigned to order of Blish Milling Company, Bainbridge, Ga., notify Draper-Garrett Grocery Company, bill of lading being signed by E. Massman, for the Railway Company and Blish Milling Company, per J. H. Holtman, bill of lading being made subject to the conditions printed on the back thereof. The portions of the conditions material to this bill of lading being:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery, then four months after a reasonable time for
28 delivery has elapsed. Unless claims are so made the carrier shall not be liable. And property not removed by the party entitled to receive it within forty-eight hours after notice of arrival has been sent or given, may be kept in car, depot, or place of delivery of the carrier, subject to lien for freight and lawful charges and including a reasonable charge for storage."

Depositions of J. H. HOLTMAN, for the plaintiff:

I know the Blish Milling Company, and it is located at Seymour, Ind. I reside at Seymour and have been there thirty-three years. I am employed by the Blish Milling Company as Cashier and Bookkeeper, and have been since June, 1906. I am not a stockholder or otherwise interested in the Blish Milling Company. I distinctly

remember the shipment of the car of flour on May 13th, 1910, to Blish Milling Company, Bainbridge, Ga., order notify Draper-Garrett Grocery Company. The original bill of lading for this car is at this time attached to the interrogatories and answers of E. Massman, taken in this case. I saw E. Massman mark the original bill of lading exhibit "A" and saw the same attached to his interrogatories and answers a few minutes ago. I know that it is the original bill of lading because it contains my genuine signature at the lower left-hand corner and at the back. I am also able to identify it by the registered number stamped thereon. I prepared and drew up said original bill of lading and my signature was signed by me to said bill of lading on the face and back as Agent for the Blish Milling Company. The value of the flour contained in said car and covered by said bill of lading was $1,099.89, and sight draft for this amount was attached to the original bill of lading, which was sent through the banks for collection. The Blish Milling Company never received payment for the flour mentioned in said bill of lading. A sight draft was drawn on Draper-Garrett Grocery Company for the value of said flour and was attached to the bill of lading. The draft was not paid and was returned unpaid to Blish Milling Company. The amount of the draft was $1,109.89, which was $10.00 in excess of the value of the flour and represented the carrying charge of five cents per barrel on two hundred barrels for one month.

29 I do not know where the original draft is and am satisfied that it has been destroyed and is not in existence. I know that the draft was attached to the original bill of lading, was never paid, and was returned to Blish Milling Company unpaid. I have made diligent search for the draft, cannot find it, and am satisfied that it is lost, and I attach a true and correct copy of the original draft and mark same Exhibit "A". The sight draft was never paid and neither was the original bill of lading ever surrendered, although it was properly endorsed. The bill of lading was correctly issued and signed by the Agent of the Railway Company. I am familiar with and know the market value of flour since and before June 5th, 1910. The highest market value of the flour inquired about at Bainbridge, Ga., since this shipment was $1,179.11, which includes the freight, amounting to $124.61.

Cross-interrogatories:

My answers to the foregoing questions are based on my own personal knowledge and are not taken from books. I drew and signed the original bill of lading as agent for Blish Milling Company at the special instance and request of said Blish Milling Company, said acts and services being part of my duties as Cashier and Bookkeeper of the Blish Milling Company.

The Following Admissions Were Made.

It is admitted that the carload of flour shipped from the Blish Milling Company, at Seymour, Ind., to Blish Milling Company, Bainbridge, Ga., order notify Draper-Garrett Grocery Company,

was originally loaded in A. G. S. car No. 8455, was transferred in route by the Central of Georgia Railway Company at Atlanta, Ga., into car in which it reached Bainbridge, same being K. C. F. S. & M. No. 27286, which car was placed on the Draper-Garrett Grocery Company's sidetrack, and by them opened and a portion of the goods unloaded, and afterwards reloaded in said car and accepted back by the Georgia, Florida & Alabama Railway Company from said Draper-Garrett Grocery Company. Also, that the freight was never paid on this carload of flour, that the draft should have been $1,099.89 and that the freight amounted to
30 $124.21, and that the freight has never been paid.

It was also admitted that wet flour comes under the head of perishable goods.

H. M. TAYLOR, sworn for the plaintiff, testified:

I recall the car of flour which we contend was converted by the Georgia, Florida & Alabama Railway Company this being a suit for its value. I was at that time Field Manager for Blish Milling Company for six states in the South. I saw part of the flour after it reached Bainbridge. I received instructions that the car of flour had been refused and to come to Bainbridge and look after it. A part of the flour was in the G. F. & A. Railway Company's depot when I arrived. The agent told me that the other part of the flour was perishable and had been sold. I think eighteen barrels was short when I arrived. The agent told me he had sold eighteen barrels. I did not count it. I do not know when the eighteen barrels was sold, he just told me that he had disposed of it. I came to Bainbridge and before going to the depot I went to Mr. Draper's warehouse. Mr. Draper was out, and I saw his clerk and told him that I had received information that they had refused the car of flour, and asked him what was the matter. He said that the flour was damaged and wet, that it was pretty badly damaged and some of the sacks were torn, and he said, "We unloaded part of the car and it got worse as we got to the bottom and we loaded it back". I suppose the bill of lading and the draft was in the bank, Mr. Draper did not have it. I have had sixteen years of experience in the flour business with this mill. The value of that flour that day was $5.40. There were thirty barrels at $6.25, $6.10 for the twenty-fours; there were thirty barrels of twelves, thirty nineteens and one hundred and forty twenty-fours. The aggregate of it was $1,084.50.

Q. "Does that take in the freight, or do you know what it would have been adding the freight?"

A. "That included the freight."

Q. "That was delivered here?"

31 A. "Yes, sir."

Q. "State whether the freight was to be added to that or was that delivered here?"

A. "No, sir, that was delivered here."

Q. "What official of the Railroad Company, if any, did you have any talk with?"

A. "Mr. Booth was agent then."

He did not tell me the flour had been delivered to anybody, I got that information from Mr. Draper. Mr. Draper stated the car had been delivered on his sidetrack and he had unloaded part of it, and reloaded it.

Cross-examination:

My recollection is I reached Bainbridge on June 6th, but I won't be positive. That was in 1910. I did not count the number of sacks at the depot. I went to the depot quite a number of times while I was here.

Depositions of B. C. PRINCE, read for the defendant:

My name is B. C. Prince. I re-ide at Jacksonville, Fla. I was Traffic Manager for the Georgia, Florida & Alabama Railway Company in the year 1910 and lived at Bainbridge, Ga. I remember the case of the Blish Milling Company against the Georgia, Florida & Alabama Railway Company relative to car of flour consigned in A. G. S. and tran-ferred to K. C. F. S. & M. 27286. My first complaint was received from Mr. H. C. Draper. After the car of flour arrived in Bainbridge, it was placed on sidetrack adjoining warehouse of Draper-Garrett Grocery Company for delivery to that company. Mr. Draper refusing to accept the flour on account of a small portion of it being wet and in damaged condition, the car with the entire contents was switched to the warehouse of the Georgia, Florida & Alabama Railway Company at Bainbridge, the damaged flour separated from the balance of the shipment, and the Blish Milling Company was called on by wire for disposition. I tendered to Blish Milling Company the entire car of flour, tender being made on June 3rd, 1910, as shown by attached telegram. In response to
32 this telegram I received from Blish Milling Company a telegram dated June 4th that they were sending their representative to Bainbridge and asking what was the nature of the damage. I also received a telegram from them on the same date stating "Our man will be there to-night or to-morrow." Mr. H. M. Taylor, representing the Blish Milling Company, came to see me at my office in Bainbridge on the morning of June 7th, 1910. I tendered him the car of flour and its entire contents. He did not accept the car, stating that he had no authority to act for the Blish Milling Company. I received a telegram from the Blish Milling Company dated June 7th, 1910, advising that they would make claim against the railroad for entire contents of car at invoice price. After the Blish Milling Company had refused the flour I had three reputable merchants of Bainbridge examine each and every sack of the flour. After again calling on the Blish Milling Company to furnish disposition of that portion of the flour in good condition, it was sold after it had been legally advertised for sale. The flour, after having been advertised for sale in the Bainbridge Search Light once a week for four successive weeks, was sold on December 23rd, 1910.

Cross-examination:

When the carload of flour arrived it was at once delivered to the Draper-Garrett Grocery Company. It was placed by the defendant on the sidetrack of the Draper-Garrett Grocery Company. That sidetrack was not owned by the defendant and was located off of the defendant's line. The grocery company did not unload the entire car. After the grocery company unloaded a portion of it and discovered that it was damaged, it reloaded it and delivered it back to the railroad company, and the railroad company accepted it back. It is not true that the railway company unloaded the car in its own warehouse before the Blish Milling Company was notified. We had the flour approximately thirty-six hours before we unloaded it. We had no authority from the Blish Milling Company to unload the flour. After we had unloaded the flour we examined it and separated it into two lots, one damaged and the other undamaged;
33 then without notice of any kind in twenty-four hours we sold and delivered the damaged portion. My recollection is that after Mr. Taylor examined the flour he said that he would wire the Blish Milling Company, as he had no authority to act. I remember that very clearly. After that conversation and on the same day I received a telegram from the Blish Milling Company informing me that they would have nothing to do with the shipment, but that they would hold the railroad company liable for it. I do not think it is true that on the 7th day of June we had already disposed of the damaged portion of the flour. To the best of my recollection we tendered Mr. Taylor the entire contents of the car, including the damaged portion of the flour. We considered we had a legal right to unload the flour in the warehouse without authority from the Blish Milling Company. Bill of lading was not surrendered to me before the delivery to the Draper-Garrett Grocery Company. I did not know whether Mr. Draper went to the warehouse with Mr. Taylor for the purpose of examining the flour. We had no agreement with either Draper or Taylor relative to the amount of damage. I believe they both contended that the damage was greater than the employees of the company considered it.

Telegram from B. C. Prince, Bainbridge, to Blish Milling Company, Seymour, Ind., dated June 3rd, 1910:

Flour order notify Draper-Garrett Grocery Company refused account damage. Hold at your risk and expense. Advise disposition.

Telegram from Blish Milling Company to B. C. Prince, dated June 4th, 1910:

Sending our representative there. What is nature of damage?

Telegram from B. C. Prince to Blish Milling Company:

Flour transferred in route. Slight damage by water, apparently rough handling. When will your representative reach Bainbridge?

Telegram from Blish Milling Company to B. C. Prince:

Our man will be there to-night or to-morrow.

Telegram from Blish Milling Company to B. C. Prince, dated June 7th, 1910:

We will make claim against railroad for entire contents of
34 car at invoice price. Must refuse shipment as we cannot handle.

W. W. Booth, sworn for the defendant, testified:

I was connected with the Georgia, Florida & Alabama Railway Company in June, 1910, in the capacity of ticket and freight agent at Bainbridge, Ga. I remember the controversy between the railway company and the Blish Milling Company relative to a car of flour. I do not know what company transferred the flour, it was not transferred by the G. F. & A. that I know of. When the car of flour reached Bainbridge, we notified the Draper-Garrett Grocery Company that it was on hand and delivered it to the A. C. L. Railroad to be switched to their sidetrack. That flour came back to the G. F. & A. Railroad, it was switched back, I would judge about two days after it was delivered. I was instructed to unload the flour in the warehouse, and if any of it was damaged pile it separately from the good flour, and I did. It seems to me we had it on our sidetrack a day before we unloaded it. Mr. B. C. Prince handled the shipment with Blish Milling Company by telegram. I would not be positive that I remember Mr. Taylor, representative of the Blish Milling Company, seeing him; I remember his second trip down here. When we got that car back and it was unloaded there were the same number of sacks of flour in the car as when the G. F. & A. Railway first received it and turned it over to the Draper-Garrett Grocery Company. It contained the same number of sacks which the invoice showed it should contain. No damage was done to that flour by the G. F. & A. Railway or its people in handling it. The flour was in extraordinarily good shape. It was in about as good shape as I ever saw. There were about seventeen barrels wet. I do not know when and how it got wet, it was a dry roof car, but the wet flour was near the door. There was none back in the car that we could find. It seems to me it was seven or eight days before we sold any damaged flour. I could not say what day we got the flour back. It was about a week after we got the flour back before we sold the damaged part. It must have been six months before we sold the remainder of it, Mr. Prince handled that part of it.

Cross-examination:

I do not remember whether we had sold seventeen or
35 eighteen barrels of the flour before Mr. Taylor got here or not. I won't say that we did not sell it before. I had no authority from him to sell eighteen barrels and none from the Blish Milling Company. I simply sold it because it was damaged. I do not know whether the bill of lading was taken up when I delivered the car. It was not surrendered to me.

H. C. DRAPER, sworn for the defendant, testified:

I was president of the Draper-Garrett Grocery Company. I recall the carload of flour involved in this controversy, shipped by the Blish Milling Company to themselves, order notify my company. I saw that flour. A portion of it was unloaded into my warehouse. The portion that was unloaded into my warehouse was in pretty fair condition, the sacks had become damaged by reason of other sacks coming in contact with them. I did not take the remainder of the flour because it was damaged. The wet flour was mixed all through the car. We did not damage the flour any in taking it out of the car. We put back into the car every sack that we took out, and then delivered it back to the G. F. & A Railroad in the same condition we received it.

Cross-examination:

Draper-Garrett Grocery Company never paid the sight draft attached to the bill of lading. The bill of lading had never been surrendered to the Draper-Garrett Grocery Company. Some of the Flour was torn and wet; I did not discover that condition until after it had been delivered to my company. I could not agree with the officials of the railroad as to the amount of damage. I do not recollect now what proposition I made them, or what proposition they made me.

Redirect examination:

I suppose we took out of the car about fifteen or twenty barrels. The flour market had declined just before that car came in.

At proper time counsel for Blish Milling Company made proper selection of verdict that jury would be asked to return.

36 We agree that the foregoing is a correct brief of the evidence. This February 3, 1914.

T. S. HAWES,
Attorney for G., F. & A. Ry. Co.
R. G. HARTSFIELD,
ERLE M. DONALDSON,
Attorneys for Blish Milling Co.

The foregoing is approved as the correct brief of the evidence in the case of Blish Milling Company vs. G. F. & A. Ry. Co. and is ordered filed as part of the record in said case.
This February 4, 1914.

H. B. SPOONER,
Judge City Court of Bainbridge.

Filed in office this 4th day of February, 1914.
C. W. WIMBERLY, *Clerk.*

Judge's Charge.

Gentlemen of the jury, in the case at bar the Blish Milling Co., brings its action in trover against the Georgia, Florida & Alabama Railway Company for the recovery of the value of certain goods or chattels alleged to have been converted by the defendant railway company.

An action of trover is defined to be a statutory form of action which lies at the suit of one having a general or special property in goods or chattels for the recovery, at the election of the plaintiff of such goods and chattels, or their value or damages to property and its hire against one who has wrongfully converted said goods or chattels to his own use.

The general rule is, that, in order to maintain trover, the plaintiff must show title in himself, or that he has the right of possession.

Before the plaintiff in the case would be entitled to recover a verdict at your hands he must show to your satisfaction and by a preponderance of the evidence that he, or they, have proven
37 by a preponderance of the evidence every material allegation as alleged in their declaration or petition.

By a preponderance of the evidence is meant that superior weight of the testimony submitted upon the issues in the case, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline the minds of a reasonable, fair, honest and impartial jury to one side of the issue rather than the other. In order to ascertain where the preponderance of the testimony lies, you will look to all the facts and circumstances connected with the case, the witnesses' manner of testifying, their intelligence, their means and opportunities for knowing the facts to which they testify, and the probability or improbability of knowing the facts to which they testify, their willingness or reluctance in testifying, their interest or want of interest in the result of the case, and the general credibility of the witnesses so far as it may legitimately appear from the facts in the trial of the case. The preponderance of the evidence does not necessarily lie with the greater number of the witnesses.

In the case at bar the plaintiff, the Blish Milling Company, claims that they shipped a certain quantity of flour to their order, the Blish Milling Co. at Bainbridge, with bill-lading attached, order notify Draper-Garrett Grocery Co.

The plaintiff contends that the delivery of the flour was not made according to directions, that the bill-lading was not surrendered as required.

The court charges you that should you find that if the Railroad Company delivered that flour to the Draper-Garrett Grocery Co. without the bill-lading being first surrendered, that that in law would constitute a conversion. They would have no right under the terms of that contract to deliver flour without that bill-lading being first surrendered and the delivery of the flour to anybody other than the one designated in the contract would be a conversion.

The object of all legal investigation, gentlemen, is the ascertainment of the truth. The jury are the judges of the facts
38 in civil cases. You take the facts as submitted to you from the witness stand, along together with the law as the court will give you in his charge, you apply the facts to the law as given you by the court and endeavor to arrive at what is a just, true, and correct verdict.

Should any apparent discrepancies arise between the different witnesses on the stand, it is the duty of the jury to reconcile such discrepancies, if possible, so as to make each and every witness speak the whole truth. Should you be unable to reconcile such apparent discrepancies, then it is entirely within the province of the jury to say who and what they will believe.

I charge you that should you find from the evidence in the case that the defendant converted the flour as set out in the plaintiff's petition and made no restoration or made no tender of the property in its entirety back to the plaintiff, you would be authorized to find in favor of the plaintiff the market value of the flour together with the freight charges added thereto and 7% interest to date from the date of the alleged conversion.

Should you find from the evidence that although the railroad company converted the flour, but after so doing they made a tender of the entire shipment of flour back to the plaintiff, and that there had been no damage resulting from the time of the alleged conversion to the time of the tender back to the plaintiff, that this could be plead in mitigation of damages, should you find that no damages had been caused by reason of the conversion up to the time of the offer to tender and of actual tender of the flour back to the plaintiff, you would be authorized in finding in favor of the defendant railroad company.

Should you find after the conversion of the property by the railroad company that damage had been done to the flour while it was in their possession and after the conversion, you would be authorized to find in favor of the plaintiff whatever amount that damage should be, if any, from the evidence submitted to you.

Should you find in favor of the plaintiff in the case your form of verdict would be: We the jury find in favor of the plaintiff,
39 whatever amount you should so find, if anything. Should you find in favor of the defendant your form of verdict will be: We the jury find in favor of the defendant.

You may retire.

The foregoing three pages is approved as the correct charge in the case of Blish Milling Co. versus Georgia, Florida, & Alabama Rwy. Co. and it is ordered filed as part of the record in said case. This 4th day of February, 1914.

H. B. SPOONER,
Judge City Court of Bainbridge.

Filed in office, February 4, 1914.
C. W. WIMBERLY, *Clerk.*

40 City Court of Bainbridge.

BLISH MILLING COMPANY
vs.
GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY

Complaint.

Amended Motion for New Trial.

Now comes the movant Georgia, Florida and Alabama Railway Co. and by leave of the court first had and obtained, amends its motion for new trial by adding thereto the following grounds:

4th. Because the court erred during the cross-examination of H. M. Taylor, a witness introduced by the plaintiff, being the field manager of the plaintiff, when the following question was asked:

Q. The flour contained in this car was sold for the total sum of $299.00, was it not?

This question was asked the witness on cross-examination by counsel for the defendant. The following objection was made by counsel for the plaintiff:

We object to the question on the ground that it is irrelevant and immaterial."

The motion was sustained and the witness was not permitted to answer the question.

Movant insists that the question was relevant and material, and if the entire contents of the car was sold for $299.00, it would have demonstrated the value of the flour, and should have at least been considered by the jury.

Counsel for defendant did not and could not state that he expected any particular answer from this witness, the witness being from the enemies' camp and under cross-examination. The witness however had testified to the market value of the flour, and we respectfully insist that if he knew the price at which the car was sold that that would have thrown some light, and would have been of some assistance to the jury in arriving at a verdict.

5th. Because the court erred in charging the jury as follows:

"Should any apparent discrepancies arise between the different
41 witnesses on the stand, it is the duty of the jury to reconcile such discrepancies if possible, so as to make each and every witness speak the whole truth. Should you be unable to reconcile such apparent discrepancies, then it is entirely within the province of the jury to say who and what they will believe."

Movant insists that this charge is error because it gives to the jury a greater discretion than is authorized by law and provides that in event the jury cannot reconcile any discrepancy, then the whole evidence is to be thrown aside, all rules of evidence abandoned as to the entire case, and "then it is entirely within th province of the jury to say who and what they will believe." We respectfully insist that the jury cannot arbitrarily disregard the evidence

of any witness for the railway company, or for the plaintiff so far as that is concerned, simply because some apparent discrepancy arises at some point in the evidence. Even if the court should hold that they would be authorized to disregard any evidence relative to which a discrepancy had arisen, they should not be authorized to substitute, or to say who and what they will believe even as to the evidence relative to which there is a discrepancy, but they should be certainly limited to the rules of evidence relative to all testimony about which there is no discrepancy.

6th. Because the court erred in charging the jury as follows: "I charge you that should you find from the evidence in the case that the defendant converted the flour as set out in the plaintiff's petition and made no restoration or made no tender of the property in its entirety back to the plaintiff, you would be authorized to find for the plaintiff the market value of the flour, together with the freight charges added thereto and seven per cent interest to date from the date of the alleged conversion."

Movant insists that this charge was error for the reason that the plaintiff is limited in its recovery to the market value of the flour plus interest, and the court erred in authorizing the jury to add to the market value of the flour freight charges, which the evi-
42 dence demonstrates had not been paid, thereby requiring the railway company to haul the freight from Seymour, Ind., to Bainbridge, Ga., free of charge and in addition thereto pay to the plaintiff $124.00 the amount of the freight, for the privilege of hauling it here. This charge was especially injurious on account of the evidence of H. M. Taylor, the field manager of the plaintiff to the effect that the aggregate value of all the flour contained in the car was $1084.50, which included the freight that delivered the flour to Bainbridge. The jury returned a verdict for this amount. Add to this the admission contained in the record that the Blish Milling Co. paid no freight, and the court will readily see that the railway company received nothing for hauling the flour from Seymour Ind. to Bainbridge Ga., but was required by the verdict of the jury to pay to the plaintiff the freight which was admitted to be $124.00, for the privilege of hauling the flour.

Movant insists that the charge was error because it states an incorrect measure of damages. Movant insists that this charge cannot be corrected by writing off a portion of the verdict, for the reason that the jury may have seen fit to deduct something from their general finding on account of the offer of the defendant to return the flour and then add to the remainder the freight from Seymour Ind. to Bainbridge, Ga., and interest on that at seven per cent to the date of the verdict.

7th. Movant insists that the court erred in charging as follows: "Should you find from the evidence that although the railroad company converted the flour, but after so doing they made a tender of the entire shipment of flour back to the plaintiff, and that there had been no damage resulting from the time of the alleged conversion to the time of the tender back to the plaintiff, that this

could be plead in mitigation of damages, should you find that no damage had been caused by reason of the conversion up to the time of the offer to tender and of actual tender of the flour back to the plaintiff, you would be authorized in finding in favor of the
43 defendant railroad company."

Movant insists that this charge was error because it is confusing, conflicting and fails to state correctly the law. The first portion of this charge is confusing, and the court does not explain itself, in that he says "Should you find from the evidence that although the railroad company converted the flour, but after so doing they made a tender of the entire shipment of flour back to the plaintiff, and that there had been no damage resulting from the time of the alleged conversion to the time of the tender back to the plaintiff, that this could be plead in mitigation of damages." This section is error and is confusing for the reason that while he states that the action of the company mentioned could be plead in mitigation of damage, he fails to explain to the jury what is mitigation of damages, what is meant by it, and while he states that it could be plead in mitigation of damages he does not state that the jury should take it into consideration, or that they should deduct from the market value of the flour any amount in mitigation of damages and fails to give any rule to govern the jury in determining what is mitigation of damages, or what they are to — in the event they find that the railroad company has complied with the rule laid down in this instruction, but the court immediately proceeds and adds to this the following:

"Should you find that no damage had been caused by reason of the conversion up to the time of the offer to tender and of actual tender of the flour back to the plaintiff, you would be authorized in finding in favor of the defendant railroad company."

This division of the charge is error and is confusing, for the reason that the court fails to define what damages he refers to in the use of the words "Should you find that no damage had been caused by reason of the conversion." We suppose that the court intended to charge that should the jury find that no damage had been caused to the flour by reason of the conversion, but the expression used by the court does not convey this meaning, and it would be impossible for the jury to say whether he intended that meaning or whether he intended them to say whether or not any damage had been caused to the plaintiff by reason of conversion. It is also confusing in that portion where it says "to the time of the offer to tender or of
44 actual tender." He confuses the offer to tender with actual tender, and the jury cannot say whether or not it was necessary for them to decide whether there was an offer to tender or an actual tender of the flour. Movant insists that the charge of the court in this instance should have been that if the railway was guilty of a technical conversion and that within a reasonable time thereafter the company tendered the entire shipment back to the plaintiff, and no actual damage having been done to the articles converted by reason of said technical conversion, that it was the duty of the plaintiff to receive them back, and having failed — receive the prop-

erty, that the jury should arrive at the value of the flour that was tendered back from the evidence in the case and should deduct the value of the flour tendered back from the market value of the goods as shown by the evidence. We insist also that an offer of tender was all that was required; in other words, that the law does not require in a case of this kind an actual tender of the goods.

8th. Movant insists that the court erred in charging the jury as follows:

"Should you find that after the conversion of the property by the railroad company that damage had been done to the flour while it was in their possession and after the conversion, you would be authorized to find in favor of the plaintiff whatever amount that damage should be, if any, from the evidence submitted to you."

Movant insists that this charge is error for the reason that it is not authorized by the evidence or by the pleadings. There is no claim by the plaintiff that the flour had been damaged by the defendant after conversion. The undisputed evidence was that no damage had occurred after conversion. Plaintiff did not ask for any judgment for any damages that occurred after conversion, and there was no evidence of any damage or the extent thereof after conversion, and no value was placed on any damage by any evidence after conversion.

W. H. KRAUSE,
T. S. HAWES,
Attorneys for Movant.

45 The foregoing grounds of amended motion being duly presented the same are allowed, approved and certified to be true, and ordered filed as a part of the record in Blish Milling Co. vs. Georgia, Florida & Alabama R'y Co. This February 4th, 1914.

H. B. SPOONER,
Judge C. C. B.

Filed in office this 4th day of February 1914.

C. W. WIMBERLEY, *Clerk.*

GEORGIA,
Decatur County:

Clerk's Office, City Court of Bainbridge, said County.

I do hereby certify that the foregoing thirty-nine pages contain a true and correct transcript of all such parts of the record as are specified in the bill of exceptions, and required by the order of the presiding judge to be sent to the Court of Appeals, in the case of Georgia, Florida & Alabama Railway Company, Plaintiff in error, vs. Blish Milling Company, Defendant in error.

Witness my signature and the seal of said court hereto affixed this the 11th day of February 1914.

[Seal of the City Court of Bainbridge, Decatur County, Georgia.]

C. W. WIMBERLEY, *Clerk.*

46 [Endorsed:] Case No. 5514. Court of Appeals of Georgia, March Term, 1914. Georgia, Florida & Alabama R'y Co. versus Blish Milling Co. Transcript of Record. Filed in office February 12, 1914. Logan Bleckley, C. C. A. Ga.

47 Court of Appeals of Georgia.

5514.

GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY
vs.
BLISH MILLING COMPANY.

By the Court:

1. An action of trover against a carrier, for conversion of goods received by the carrier for transportation, may be maintained in the county in which the conversion took place; and this is so without regard to whether the carrier received the goods in interstate transportation under a bill of lading issued to the plaintiff by a connecting carrier in another State.

2. (*a*) A shipper, by consigning goods to his own order and attaching to the bill of lading a draft for the price of goods, indicates an unequivocal intention to retain title to them until his draft is paid.

(*b*) Any distinct act of dominion, inconsistent with the owner's right, wrongfully asserted over his property by another, may amount to a conversion, whether the wrong-doer exercised such dominion for his own use or for the use of a third person.

(*c*) Where goods shipped to the shipper's order are deliv-
48 ered by the carrier to another without production of the bill of lading covering the shipment, the delivery is at the carrier's risk and may subject the carrier to a suit in trover.

3. A carrier who, by conversion of property which the carrier received for transportation, abandons the contract of carriage, can not insist upon a stipulation in the bill of lading that claims for loss or damage must be made within a specified time and in writing, to the carrier's agent at the point of delivery. The carrier can not repudiate the contract and then hold the shipper to its terms.

4. "Demurrer, being a critic, must itself be free from imperfections." Douglas, Augusta & Gulf R'y Co. v. Swindle, 2 Ga. App. 550 (4), 556 (S. E.), citing Martin v. Bartow Iron Works, 35 Ga. 323. Even if a demurrer alleging that the petition "does not show any right in the plaintiff named therein to bring the suit" was sufficiently specific to present the objection that the petition failed to allege whether the plaintiff was a partnership or a corporation, this objection would not constitute a sufficient ground for demurrer; for the plaintiff's name, "Blish Milling Company," imports a corporation.

5. The court did not err in overruling the ground of the
49 demurrer that "the suit being a suit in trover, and the petition not showing that the bailment is waived, and the property not being in the hands of, nor suit filed against, either party to the contract, the suit will not lie."

6. An assignment of error as to the refusal to allow counsel to propound a certain question to a witness, or the witness to answer it, presents nothing for the consideration of the reviewing court, when it does not appear that the trial judge was informed of the probable answer of the witness.

7. An instruction to the jury to the effect that where there are discrepancies in the testimony of different witnesses, it is the duty of the jury, if possible, to reconcile the discrepancies so as to make each witness speak the whole truth, but if they be unable to reconcile the descrepancies, it is within their province to say who and what they will believe, does not afford ground for a new trial.

8. A mere offer to deliver is not delivery; and an unaccepted offer to restore converted chattels will not relieve the tort-feasor no ordinarily mitigate damages. Especially would the offer be ineffectual if made after deterioration in the character, quality, and
50 value of the goods, and without an offer to make good the loss, by tendering such an amount as would place the owner in the position in which he would have been if there had been no conversion. A tender in trover must embrace all the property claimed by the plaintiff, and must be unconditional.

9. Since it appears, from the evidence, that the freight upon the shipment of flour had not been paid, the court erred in instructing the jury that if they were satisfied, from the evidence, that the defendant converted the flour, they would be authorized to find for the plaintiff the freight charges, in addition to the market value of the flour; and direction is therefore given that the verdict and judgment be reduced by writing off the amount of the freight charges as disclosed by the undisputed evidence.

10. The instructions to the jury as to mitigation of damages were not subject to the exceptions taken.

11. Where a plaintiff asks an alternative verdict in damages for the conversion of property, and it appears, without dispute, that the property itself can not be restored to him, it is a matter of no concern to him whether the property was damaged while in the pos-
51 session of the defendant or not; for he is entitled to recover the market value of the property at the time of the conversion, with interest. Therefore it was error for the court to charge the jury that if they found that damage was done to the flour while in the possession of the defendant after a conversion of it by the defendant, they would be authorized to find in favor of the plaintiff whatever amount the evidence might disclose that damage to be; but in view of what had been stated above in this headnote, and as is apparent from the amount of the verdict, the error was harmless to the defendant.

* * * * * * *

On May 13, 1910, the Blish Milling Company, of Seymour, Indiana, shipped from that place to Bainbridge, Georgia, a car-load of flour, consigned to itself, with order to notify Draper-Garrett Grocery Company. The bill of lading, acknowledging receipt of the flour at Seymour, Indiana, was issued by the Baltimore & Ohio Southwestern Railway Company. The shipper's sight draft upon the Draper-Garrett Grocery Company, for $1,109.89, covering the price of the flour and the additional sum of $10.00 as a carrying charge of
52 five cents per barrel for 200 barrels for one month, was attached to the bill of lading, with proper endorsement, and sent to a bank in Bainbridge for collection. The flour was loaded in car "A. G. S. No. 8455," and from that car was transferred en route by the Central of Georgia Railway Company, at Atlanta, Georgia, and placed in car "K. C., F. S. & M. No. 27286," in which it reached Bainbridge over the line of the Georgia, Florida & Alabama Railway Company, in accordance with routing; and the last-named railway company, without requiring payment of the draft and surrender of the bill of lading, delivered the car of flour to the Draper-Garrett Grocery Company, immediately on its arrival, June 2, 1910, by placing it on a side-track owned and controlled by the grocery company. The bill of lading and draft were not called for, and were finally returned to the Blish Milling Company. The grocery company, on delivery of the car, opened it and unloaded a part of its contents, but discovered that some of the flour was wet, and thereupon reloaded the part that had been unloaded, and turned the car back to the railway company. The railway company retook possession of the car and unloaded it, and in a few days sold, as perishable property, a part of the flour alleged to be dam-
53 aged, and on December 23, 1910, sold the remainder. On June 3, 1910, after the grocery company had turned the flour back to the railway company, B. C. Prince, traffic manager of the Georgia, Florida & Alabama Railway Company, telegraphed to the Blish Milling Company as follows: "Flour order notify Draper-Garrett Grocery Company refused account damage. Hold at your risk and expense. Advise disposition." On the next day the milling company replied by telegraphing to Prince, "Sending our representative there. What is nature of damage?" To this Prince replied: "Flour transferred in route. Slight damage by water, apparently rough handling. When will your representative reach Bainbridge?" The Blish Milling Company replied that their man would be there that night or the next day. On June 7 (after the milling company's representative had reached Bainbridge and conferred with the agents of the railroad company and with the grocery company) the milling company sent a final telegram, saying, "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle." It appears, from the evidence of Mr. Draper, that the price of flour declined after his order was given and before the flour reached
54 Bainbridge. There is conflict in the evidence as to a tender of the flour by the railway company to the milling company's

representative. According to some of the testimony, about 18 barrels of the flour had been sold by the railway company before the alleged tender was made, and therefore it was not within the power of the carrier to tender the shipment in its entirety. The contract of shipment contained a provision that "claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." So far as appears from the record, no claim was filed by the shipper.

After the dismissal of a former suit, which appears to have been filed on February 14, 1911, the Blish Milling Company filed the present suit in trover, alleging a conversion of the shipment by the carrier; and the plaintiff having elected to take a money verdict for the value of the property, the jury rendered a verdict in its favor for $1,084.50. It was admitted by the parties that the
55 freight was never paid; that the draft should have been for $1,099.89, and that the freight upon the car from Seymour, Indiana, to Bainbridge, Georgia, amounted to $124.21. On the trial a demurrer to the petition was overruled. Exceptions pendente lite to this ruling, and exception to the judgment refusing a new trial, are brought up by the bill of exceptions.

* * * * * * *

Russell, C. J. (After stating the foregoing facts). The demurrer includes four grounds of objection to the petition, which we shall consider seriatim.

1. In the first ground complaint is made that the city court of Bainbridge "is without jurisdiction of the subject-matter of the case in question, the cause of action being a contract of bailment entered into by and between the Blish Milling Company and the Baltimore & Ohio Southwestern Railway Company." It is contended that the defendant was not directly connected with the contract, and that the action should have been brought against the initial carrier; or that if the present defendant was suable at all, the remedy against it was an action for damages, under the act of Congress regulating interstate transportation, known as the Hepburn Act. Even
56 though it be true that the shipment is controlled by the Hepburn act, we fail to see that the city court of Bainbridge is by that fact deprived of jurisdiction.

We think the ruling upon this ground of the demurrer is controlled by the decision of this court in Southern Railway Co. v. Morrison, 8 Ga. App. 647. In that case Morrison brought suit in trover against the Southern Railway Company, to recover certain cotton alleged to have been delivered to the carrier in Monroe county, for shipment to Macon, in Bibb county, and upon his own testimony was only able to show that he had delivered the cotton to an agent of the defendant in Monroe county, and at the time of the motion for nonsuit he had not shown that the cotton had not been shipped away from Monroe county, and therefore he failed to prove the venue; because he alleged an affirmative tort, and failed to show

that the actual conversion did not take place in Bibb, or some other county. After Morrison had shown that the cotton was delivered to the carrier at a point in Monroe county, and not in Macon, thus, as stated by Judge Powell, "showing the loss, but not necessarily the conversion, the defendant came in and showed that the cotton had never been shipped out of Monroe county;" and this court
57 held that an action of trover for conversion may be maintained against a carrier in the county where the conversion took place; and that "as the defendant's own testimony affirmatively disclosed that the presumed conversion took place at the point of shipment and not elsewhere, it consequently disclosed that if the plaintiff had a cause of action, he had one that lay within the venue where the suit was pending."

The fact that in the Hepburn act there is no reference to proceedings in trover suggests that Congress, not having dealt with the remedy provided by an action in trover, had left to each State the free use of that remedy at its option. However, in the present case, if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier, suggested by learned counsel for the plaintiff in error as the plaintiff's appropriate remedy. If an action for damages can be maintained against a delivering carrier, without the necessity of proving that the delivering carrier itself caused the damage (Way v. Sou. Ry. Co., 132 Ga. 677), and an action of trover can be maintained upon a constructive conversion evi-
58 denced only by the failure to deliver, it would seem clear, under the ruling in Morrison's case, supra, as well as under the ruling of the Supreme Court of the United States in North Penn. R. Co. v. Commercial National Bank, infra, that trover may be maintained against the last carrier when it is shown that the last carrier actually converted the property. In such a case clearly the venue would be where the conversion occurred.

2. In the second ground of the demurrer it is insisted that "the petition sets up no cause of action against the defendant." The principles stated in the second headnote are well settled. The bill of lading, according to the uncontradicted testimony, was not presented or demanded, and the draft had not been paid, at the time the defendant turned the car of flour over to the Draper-Garrett Grocery Company; and, under the terms of the contract, the carrier had agreed to deliver the shipment only to the Blish Milling Company, at Bainbridge, Georgia, or to its order, as might appear by the endorsement on the bill of lading. "If for any reason the seller, at the time of the shipment and delivery of the goods to the common carrier, takes a bill of lading to his own order, and attaches thereto a draft for the purchase-money, he thereby expresses his intention to retain the title until the draft is paid, or accepted and
59 secured; and where this method of shipment is adopted the carrier becomes the agent of the seller or consignor, and would be authorized to deliver the goods only on the surrender to it of the bill of lading." Southern Ry. Co. v. Strozier, 10 Ga. App. 157 (3). See also Erwin v. Harris, 87 Ga. 335 (13 S. E. 513), and

Moss v. Sell, 8 Ga. App. 588, (70 S. E. 18). On an "order notify" shipment, where a draft upon the person to whom the goods were to be delivered upon payment of the draft was attached to the bill of lading, so endorsed as to give a bank control of the possession of the goods, the delivery of the goods to the drawee without requiring payment of the draft was held to be a conversion, subjecting the bank to an action of trover at the instance of the owner. Hobbs v. Chicago Packing Co. 98 Ga. 576. The milling company, by electing to retain title until the draft was paid, sold the goods for cash. The railway company, without any regard for the milling company's rights or wishes, and in violation of its expressed intention, undertook to let the Draper-Garrett Grocery Company have the flour on time, or without paying the draft; and, of course, this must be held to be a conversion. It is the wrongful exercise of dominion over another's property that makes a conversion. It is not necessary that the proof show that the defendant applied it to his own use; it need only be shown that he dealt with the property as if it were his own and in defiance of the owner's rights. It is entirely immaterial that the conversion was not for his own use or that he derived no benefit therefrom. Merchants' & Miners' Transportation Co. v. Moore, 124 Ga. 482. Whenever goods which the consignor has shipped to his own order are delivered without the production of the bill of lading, the delivery is at the carrier's own risk, and subjects the carrier to liability in trover for the conversion. Boatman's Savings Bank v. W. & A. R. Co., 81 Ga. 223; Northern Penn. R. Co. v. Commercial National Bank, 123 U. S. 727.

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3. It is insisted, however, by counsel for plaintiff in error, that the milling company was precluded from bringing this action by reason of the plaintiff's failure to comply with the stipulations in the third section of the bill of lading, which, in case of failure to make delivery, require the consignor to make a written claim for damages within four months. Counsel's whole argument is based on the fact that the shipment which is the subject-matter of this suit was moving in interstate commerce, under the provisions of the Federal law, and under a bill of lading regularly approved by the interstate commerce commission. Counsel argue that as the Supreme Court of the United States has held that this provision of the contract is valid, and has held that the Carmack amendment to the Hepburn act "furnishes the exclusive rule on the subject of the liability of a carrier under contracts for interstate shipments," and as it has been further held by that court that the State laws, declaring contracts invalid which require the bringing of an action against a carrier for loss or damage to a shipment in less than the statutory period, are superseded, as to interstate shipments, by the Carmack amendment (M. K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690 (2)), to hold that the plaintiff could maintain the present action would be to conflict with what has been held by the Supreme Court of the United States. Nothing could be more abhorrent to this court than a failure to yield cheerful adherence to the decisions of the Supreme Court of the United States. It is at once our duty and our pleasure to do so.

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This court has more than once referred to the fact that our commonwealth has incorporated in its organic law a declaration that
62 the statutes of the United States and the decisions of the Supreme Court of the United States thereunder are paramount and controlling. We have examined with care the decisions to which counsel have referred, but we have failed to see how the original validity of the contract affects the issue before us. It is conceded that if there be any State law declaring invalid that portion of the contract of shipment which requires the bringing of an action within less than the statutory period, it is superseded by the Carmack amendment; and in M. K. & T. Ry. Co. v. Harriman, supra, it was held that it would not be unreasonable to limit the time within which claims for failure to make delivery should be filed. Under the rulings of the Supreme Court of the United States, and, even if the point had not been passed upon by it, under the provisions of our own constitution (since the passage of the Carmack amendment), we would hold that the stipulation to which counsel refer is perfectly valid. But, according to the allegations of the petitions, the contract was abandoned and repudiated by the defendant; and the defendant could not thereafter insist upon the stipulation in the bill of lading as to the time within which claims for damage
63 should be presented. Merchants' & Miners' Transportation Co. v. Moore, 124 Ga. 482 (4, 5).

No question of penalty or punishment of the defendant company, for failing to comply with its contract, is involved in the allegations of the petition as we view them. The suit was brought not because of the failure to deliver, but because the defendant did deliver the goods, and because, by the wrongful delivery, in defiance of the consignor's instructions, the carrier appropriated the goods to its own use. The stipulation as to presentation of claim provided that "in case of failure to make delivery" the shipper should make his claim for damages within four months after a reasonable time for delivery; and this could not be held to include a case where there was not only failure to deliver to the consignee, but actual delivery to another.

Counsel criticizes the statement made in Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 356, that "there is a wide difference between loss and conversion," and argues as if there is necessarily a conversion whenever there is a failure to deliver, and from that argues that the use of the words in the stipulation in question,—"in case of failure to make delivery" precludes the present action.
64 The statement made in the Goodwin case, supra, is adhered to, for failure to deliver may entail loss upon a shipper without any conversion on the part of the carrier. In Southern Ry. Co. v. Morrison, supra (p. 648), Judge Powell points out the difference between a mere failure to deliver and an actual conversion where there has been a failure to deliver (and, of course, a failure to deliver is included in and essential to the act of conversion). It is there said: "A person who has delivered goods to a carrier for shipment, * * * where the goods have not been delivered at destination, * * * can sue ex contractu in the county where

the contract of shipment is made, or in the county where the contract is to be performed, that is, the county of the destination of the shipment. He can sue ex delicto for the carrier's failure to discharge its public duty of delivering goods at the place of destination * * * If he can show an affirmative tort, can show that the goods were in fact wrongfully converted by the carrier, * * * he may sue in the county where the wrong took place, making the particular wrong itself, and not the breach of public duty for failure to deliver, the basis of his cause of action." Suppose the shipment were destroyed by fire, the shipper would lose the goods and the
65 carrier would fail to deliver, and yet there would be no conversion. Instances might be multiplied indefinitely to show that while the failure to deliver may sometimes amount to a conversion, it does not necessarily have that effect. It has been held that where a shipper sought to maintain trover for goods which the carrier refused to deliver without payment of freight, there was no conversion and the action would not lie. Under the rulings we have cited, there was in this case an actual conversion by delivery, which terminated the shipment. If the railway company's abandonment or repudiation of the contract did not terminate or annul it, it must be because there is some difference between a contract of carriage and other contracts which we are unable to see. It is true the conversion was technical, but it was a breach of the contract; and it is fundamental that if one party breaches the contract the other party is released.

It is not necessary to refer to the argument that the railway company waived its rights to insist upon the provision of the bill of lading in regard to the filing of a written claim within four months; for the interstate commerce commission, in Order No. 787,
66 issued June 27, 1908, specifically ruled that no provision of a bill of lading can be waived. The question of a waiver is not involved here, because the allegation of the petition is that the carrier repudiated and violated the contract.

4. As to the third ground of demurrer, it is not necessary to add to what is said in the fourth headnote.

5. We think the fourth ground of the demurrer—that, "the suit being a suit in trover, and the petition not showing that the bailment is waived, and the property not being in the hands of, nor suit filed against either party to the contract, the suit will not lie"—was properly overruled, in view of the allegations that the defendant was the last of the several connecting carriers, each of whom had adopted the contract, and that the property was shown to have passed into the possession of the defendant. The suit in trover was itself a waiver of the bailment. "A suit in trover is not an action for loss or damage to property, but an action for conversion of property. The conversion on the part of the carrier is an abandonment by it of its contract of shipment." Merchants' & Miners' Transportation Co. v. Moore, 124 Ga. 483. In that case the bill of
67 lading was issued, not by the defendant, the Merchants' & Miners' Transportation Company, but by the Baltimore & Ohio Railroad Company, and Moore & Company paid the draft and

obtained the bill of lading at Savannah, the point of destination of the shipment. A stipulation similar to that in the instant case was incorporated in the bill of lading in that case, and it was insisted there, as it is here, that the action could not be maintained because there had been no written claim for loss or damage. As to this contention of the carrier, Cobb, J., in the opinion, says: "It can not repudiate this contract and then hold the shipper to its terms. Further, we do not think the terms of the contract cover such an eventuality. It was never contemplated by either party that a claim for damages should be presented to the carrier for the result of its voluntary act. It was the purpose of the contract to provide a procedure for the adjustment of damage suffered by reason of some occurrence for which the carrier was liable, but which it did not wrongfully bring about. There would be no reason in demanding that a claim be presented for damages flowing from an act which by its very commission denies any right in the claimant."

In comparing that case with the case at bar it may be re-
68 marked that the only conversion shown there was the delivery by the defendant of the oats in question to another carrier, who transported them to Jacksonville.

6. Error is assigned upon the refusal of the court to allow a witness for the plaintiff to state, on cross-examination, the amount for which the flour was sold by the railway company in December. The movant insists that if the witness had answered in the affirmative, that the contents of the car sold for only $299, it would have demonstrated the value of the flour, and should at least have been considered by the jury on the subject of value. It is well settled that an assignment of error as to the refusal to allow a witness to be asked a question presents nothing for the consideration of the reviewing court, when it does not appear that the judge was informed of the probable answer of the witness. In the assignment of error before us it is stated that the defendant "did not and could not state that he expected any particular answer from this witness, the witness being from the enemy's camp and under cross-examination." There ap-
pear to be reasons why the rule requiring that the expected
69 answer be stated to the court should be relaxed upon cross-examination, but the ruling of the judge seems to be in accordance with what has been previously held on this point. See Loeb v. State, 6 Ga. App. 28.

Aside from this, however, it does not appear that the plaintiff in error was injured by the refusal of the court to allow the witness to answer the question, because even if the witness had answered that the flour was sold for $299 on December 23, 1910, that fact would have shed no light upon the value as legally computed in suits in trover. In trover the plaintiff is entitled to recover the highest market value between the date of the conversion and the time of the trial. The fact that there might have been, without dispute, periods when the value of the flour was very low, would not have touched the real issue about which there might have been conflict, to wit,—what was the highest market value between the periods mentioned?

7. Exception is taken because the court charged the jury as follows: "Should any apparent discrepancies arise between the witnesses on the stand, it is the duty of the jury to reconcile such discrepancies, if possible, so as to make each and every witness speak the whole truth. Should you be unable to reconcile such
70 apparent discrepancies, then it is entirely within the province of the jury to say who and what they will believe." It is insisted that the tendency of this instruction was to "turn the jury loose" to base the verdict on matters outside of the testimony, or at least to leave the jury to infer that they could arbitrarily disregard the whole evidence of a witness simply because there was a discrepancy at some point in his evidence. The verdict returned, which is supported by the evidence, does not indicate that the finding of the jury was based upon anything outside of the record; and so, while it would have been better for the judge to confine the jury to the testimony actually adduced, when he told them it was within their province to determine what they would believe, the movant failed to carry the burden of establishing injury as well as error.

8. Exceptions are taken to the charge of the court on the subject of tender. It is true that either actual return of the property or a tender to return goes in mitigation of damages, but the jury were authorized to find, from some of the evidence, that the entire property was never tendered, and for that reason, as
71 well as because the court did expressly instruct them that evidence of tender would go in mitigation of damages, if they should find any, we deem a discussion of this assignment of error unnecessary. According to the plaintiff's evidence, 18 barrels of the flour had been sold prior to any offer to return the remainder. Under the undisputed testimony there had been a deterioration in the condition and value of the flour subsequently to the shipment; and in offering to return the flour to the Blish Milling Company the railway company did not offer to make good the damage to the flour. This would have been essential to a good tender, even if the testimony to the effect that none of the flour had been sold at the time of the tender is in fact the truth of the case.

9. Since, under the well settled rule in Georgia, the alternative recovery of damages in trover is limited to the value of the property converted, with interest, the court erred in instructing the jury that the freight charges were to be added thereto; but since the amount of the freight charges was fixed by agreement of the parties, it is unnecessary to send the case back for another trial to correct the error in this respect. It is undisputed that the freight had not been paid; and direction is therefore given that the verdict
72 and judgment be reduced by writing off $124.21, the amount of the freight charges, together with $28.73, interest thereon.

10. Complaint is made that the court erred in charging the jury: "Should you find, from the evidence, that * * * the railroad company converted the flour, but after so doing they made a tender of the entire shipment of flour back to the plaintiff, and that there had been no damage resulting, from the time of the alleged con-

version to the time of the tender back to the plaintiff, this could be plead in mitigation of damages. Should you find that no damage had been caused by reason of the conversion, up to the time of the offer to tender, and of actual tender of the flour back to the plaintiff, you would be authorized in finding in favor of the defendant railroad company." It is insisted that this charge is confusing and conflicting and fails to state correctly the law, because the court failed to explain to the jury what was meant by "mitigation of damages," and did not specifically state that the jury could take the tender into consideration or deduct any amount from the market value of the flour, in mitigation of damages, and did not give any rule to govern the jury in determining what was mitigation of damages. From these instructions the jury were

73 obliged to understand that if they found that no damage had resulted to the plaintiff from the alleged conversion and that the defendant tendered the property back, these facts should be considered by them in reduction of the damages. The word "mitigation" is a term in ordinary use, and may be assumed to have been understood by a jury of ordinary intelligence. If counsel for the defendant desired the court to give instructions such as they contend should have been given on this subject, the instructions should have been requested. Immediately following the instruction just quoted, as to mitigation of damages, the court charged the jury that if they should find "that no damage had been caused by reason of the conversion, up to the time of the offer to tender, and of actual tender of the flour back to the plaintiff," they "would be authorized in finding in favor of the defendant railway company." This instruction afforded the defendant no ground for complaint, as it apparently qualified the instruction immediately preceding, and authorized the jury, if they credited the testimony in favor of the defendant, to find for the defendant in spite of the uncontradicted proof of conversion.

74 11. In instructing the jury that they would be authorized to find for the plaintiff for damage done to the flour after the conversion, the court erred, for the reason that by conversion the liability of the defendant and the amount thereof became fixed. If the defendant converted the property, it became liable to respond, either by being compelled to return the property itself, with its reasonable hire, or if it was not possible to return the property, to pay the market value and interest; and it was a matter of no concern to the plaintiff what the defendant did to the property after converting it. It is, of course, always error to submit to the jury a theory which finds no support in the evidence; but this error does not afford ground for reversal when it is perfectly plain that the error was harmless, and that it could not, from the nature of things, have affected the result. In the present case, it is true, there is no evidence that the defendant damaged the property after conversion; and therefore, even if this instruction had been correct, it would have been inappropriate; but there is absolutely no dispute as to the conversion, and even if the evidence as to the market value of the flour had been more conflicting than it was, the in-

struction as to damages to the flour after conversion could
75 have had no bearing upon the finding of the jury on the subject of value.

We have already referred to the matter of freight, and it is apparent that the verdict in favor of the plaintiff included the charge for freight, which had not been paid by the plaintiff. Necessarily the cost of transportation, or, in other words, the freight charge, enters into the market value of an article at any designated point to which such an article is ordinarily transported. When the freight has been paid by the shipper he will recover it in an action of trover when he recovers the market value at the point of destination. Where, in computing the market value of an article at a given point, the valuation includes charges of transportation which have not been paid by the shipper, the necessary freight charges should, of course, be deducted when the action is against the carrier who is entitled to the collection of the freight charges.

Judgment affirmed, with direction.

Roan, J., absent on account of sickness.

76 Court of Appeals of the State of Georgia.

5514.

ATLANTA, September 11, 1914.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

GEORGIA, FLORIDA & ALABAMA RY. CO.
v.
BLISH MILLING CO.

This case came before this court upon a writ of error from the city court of Bainbridge; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed, with direction that the plaintiff write off from the principal sum found by the verdict and included in the judgment the amount of the freight, to wit, $124.21, together with the interest on this amount, to wit, $28.73. All costs of the writ of error are awarded in favor of the plaintiff in error against the defendant in error.

Roan, J., absent on account of sickness.

Bill of costs, $10.00.

77 In the Court of Appeals of the State of Georgia.

GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY
versus
BLISH MILLING COMPANY.

To the Honorable Richard B. Russell, Chief Judge of the Court of Appeals of the State of Georgia:

The petition of the Georgia, Florida and Alabama Railway Company respectfully shows that heretofore, to wit, on the 23rd day of September, 1913, there was tried in the City Court of Bainbridge, in the County of Decatur, State of Georgia, a case in which the Blish Milling Company was plaintiff and your petitioner was defendant. The declaration of the plaintiff in said case was a petition for the recovery of damages in the sum of one thousand two hundred, twenty-four dollars, fifty cents, ($1224.50) for the alleged wrongful delivery of certain flour, consigned in an interstate shipment of freight by the plaintiff at Seymour, Indiana, to itself at Bainbridge, Georgia, with direction to notify Draper-Garrett Grocery Company, at Bainbridge, Georgia, the bill of lading, a copy of which was attached to said petition, being issued by the Baltimore and Ohio Southwestern Railroad Company, at said Seymour, Indiana, and said shipment being routed via the Louisville and Nashville Railroad, the Western and Atlantic Railroad, Central of Georgia Railway Company, and your petitioner, Georgia, Florida and Alabama Railway Company.

Upon the trial of said case in said City Court, your petitioner demurred to the plaintiff's petition upon the following grounds, to wit:

1st. That the petition shows that the City Court of Bainbridge is without jurisdiction of the subject matter of this cause of action, the cause of action being a contract of bailment, entered into by and between the Blish Milling Company and the Baltimore and Ohio Southwestern Railway Company.

78 2nd. The petition sets up no cause of action against this defendant.

3rd. The petition does not show any right in the plaintiff named therein to bring this suit.

4th. Said suit being a suit in trover and the petition not showing that the bailment is waived, and the property not being in the hands of nor suit filed against either party to the contract, the suit will not lie.

That, upon the argument of said demurrer, your petitioner, as it was authorized to do under the rules of practice and procedure governing the Courts of the State of Georgia, among other things, urged the following rights, privileges, and immunities, arising under the Constitution and laws of the United States, to wit:

I.

That said City Court of Bainbridge had no jurisdiction to try said suit, for the reason that plaintiff's right of action, if any it had, was against the initial carrier, to wit, the Baltimore and Ohio Southwestern Railroad Company, under the Act of Congress, which is commonly known as the Carmack amendment to section twenty of the Hepburn bill.

II.

That the shipment of freight in controversy, being an interstate shipment of freight, plaintiff's right of action was barred by reason of the following stipulation in the bill of lading to wit:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; unless claims are so made, the carrier shall not be liable."—such bar being a right, privilege, and immunity guaranteed by the Act of Congress, approved February 4, 1887, entitled,

"An Act to Regulate Commerce," and the several Acts of
79 Congress amendatory of said Act, and the decisions of the Supreme Court of the United States, construing said Acts, and said bill of lading being approved by the Interstate Commerce Commission of the United States,—which said demurrer was overruled by the Judge of said City Court, and exception duly taken and entered by your petitioner, in accordance with the laws and rules of practice governing the Courts of the State of Georgia. Upon the trial of said cause in said City Court, your petitioner also specially plead that plaintiff's cause of action, if any, was barred by reason of the aforesaid stipulation in said bill of lading, and thereby claimed the right, privilege, and immunity guaranteed to your petitioner by the laws of the United States; and upon the trial of said cause, the jury returned a verdict against your petitioner in the sum of one thousand eighty-four dollars fifty cents ($1084.50), upon which verdict a judgment was entered against your petitioner in said City Court, in accordance with the rules of practice and procedure governing said Court. Thereafter your petitioner filed in said City Court a motion for new trial, in accordance with the rules of practice and procedure governing the Courts of the State of Georgia, and upon the argument of said motion for new trial, expressly urged and claimed a right, privilege, and immunity guaranteed to your petitioner under the laws of the United States, to wit, that Plaintiff's cause of action, if any, was barred by reason of the aforesaid stipulation in the bill of lading, said shipment of freight being an interstate shipment, moving from Seymour, Indiana, to Bainbridge, Georgia, under an interstate bill of lading, issued on a form approved by the Interstate Commerce Commission of the United States, and that, under the laws of the United States and the decisions of the Supreme Court of the United States, construing the same, plaintiff was barred by reason of plaintiff's failure to file a claim within four months, as plaintiff was bound to do under the aforesaid stipulation

in said bill of lading,—which said motion was overruled by said City Court of Bainbridge; and thereafter your petitioner, in accordance with the rules of procedure and practice governing such cases in the State of Georgia, duly and regularly carried said
80 cause to the Court of Appeals of the State of Georgia, the same being the highest court in the State which had jurisdiction to review the rulings and judgments of said City Court of Bainbridge, and that, on the 11th day of September, 1914, said Court of Appeals of the State of Georgia filed an opinion and rendered judgment, affirming the ruling and judgment of said City Court of Bainbridge, with direction to write off certain freight charges and thereby expressly denied to your petitioner all of the rights, privileges, and immunities, aforesaid, guaranteed to it by the laws of the United States.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia and the Judges thereof, to the end that the record in said cause may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment be reversed. Your petitioner further prays that it may be permitted to file a bond in accordance with the provisions of law in such sum as Your Honor may direct, and thereupon said judgment may be superseded until said cause is determined and decided by the Supreme Court of the United States.

GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY,
By T. S. HAWES AND
ALEXANDER AKERMAN,
Its Attorneys at Law.

Filed in office September 26, 1914 Logan Bleckley Clerk, Court of Appeals of Georgia.

81 In the Court of Appeals of the State of Georgia.

GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY
vs.
BLISH MILLING COMPANY.

The above entitled cause coming on to be heard, upon the petition of the Georgia, Florida and Alabama Railway Company for writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia, and upon examination of said petition and the record in said cause, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said cause, it is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States, said writ of error to operate as a supersedeas, and the bond for that purpose is hereby

fixed at the sum of twenty-five hundred dollars ($2500.00), dated at Atlanta, Georgia, this 23th day of September, A. D. 1914.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office September 26, 1914. Logan Bleckley, Clerk Court of Appeals of Georgia.

82 In the Court of Appeals of the State of Georgia.

GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY
versus
BLISH MILLING COMPANY.

Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Court of Appeals of the State of Georgia in the above entitled matter there is manifest error in this, to wit:

I.

The Court erred in affirming the judgment of the City Court of Bainbridge overruling the demurrer to the petition of the plaintiff, wherein it was urged that the petition showed that the City Court was without jurisdiction of the subject matter of the cause, thereby holding and deciding that the cause of action of the plaintiff in the lower court was not exclusively against the Baltimore and Ohio Southwestern Railroad Company, as the initial carrier, under what is commonly known as the Carmack Amendment to section twenty of the Hepburn bill.

II.

The Court erred in affirming the judgment of the City Court of Bainbridge overruling the demurrer to the petition of the plaintiff in the court below, wherein it was claimed that plaintiff's right of action was barred by reason of the following stipulation in the bill of lading, to wit:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; unless claims are so made, the carrier shall not be liable."—Thereby holding and deciding that the right of action of the plaintiff in the court below, if any it had, was not one arising under the Act of Congress, approved February 4, 1887, entitled, "An Act to Regulate Commerce," and the several Acts

83 of Congress amendatory of said Act, and therefore that plaintiff's right of action was not barred under said stipulation in the bill of lading, the form of said bill of lading having been approved by the Interstate Commerce Commission of the United States.

III.

The Court erred in affirming the judgment of the City Court of Bainbridge, denying the motion for new trial, and thereby holding and deciding that plaintiff's right of action was not barred by reason of failure of the plaintiff in the court below to make claim for loss and damage, in writing, to the carrier at the point of delivery, or at the point of origin, within four months after a reasonable time for delivery had elapsed, the interstate bill of lading, issued under a form approved by the Interstate Commerce Commission, expressly providing that, in case of failure to make such claim in writing, carrier should not be liable.

IV.

The Court erred in holding and deciding that the right of action of the plaintiff, the Blish Milling Company, was not under what is commonly known as the Carmack amendment of section twenty of the Hepburn bill, exclusively against the initial carrier, the Baltimore and Ohio Southwestern Railroad Company.

V.

The Court erred in holding and deciding that, in a movement of an interstate shipment of freight over the lines of connecting carriers, plaintiff's right of action for an alleged wrongful delivery of the freight was not one arising exclusively under the laws of the United States, and that plaintiff in said City Court of Bainbridge was not barred under the laws of the United States, by reason of plaintiff's failure to present a claim in writing to the carrier at the point of delivery, or at the point of origin, within four months after the delivery, or within four months after a reasonable time for delivery.

T. S. HAWES,
ALEXANDER AKERMAN,
Attorneys for Plaintiff in Error.

84 Filed in office September 26, 1914. Logan Bleckley, Clerk, Court of Appeals of Georgia.

85 Know all men by these presents, That we, The Georgia, Florida and Alabama Railway Company, as principal, and Massachusetts Bonding & Insurance Company, as sureties, are held and firmly bound unto Blish Milling Company, in the full and just sum of Two Thousand Five Hundred ($2,500.00) dollars, to be paid to the said Blish Milling Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of September, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of the Court of Appeals of the State of

Georgia in a suit depending in said Court, between The Georgia, Florida and Alabama Railway Company and Blish Milling Company a judgment was rendered against the said Georgia, Florida and Alabama Railway Company and the said Georgia, Florida and Alabama Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Blish Milling Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Georgia, Florida and Alabama Railway Company shall prosecute its writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY,
[SEAL.] By ALEXANDER AKERMAN,
Its Attorney at Law.
[SEAL.] MASSACHUSETTS BONDING AND INSURANCE COMPANY,
[SEAL.] By EUGENE DODD,
Attorney in Fact.

[Impressed Seal.]

Attest:
FAIR DODD.

Sealed and delivered in presence of
HARRY DODD.

Approved by:
RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office September 28, 1914. Logan Bleckley, Clerk, Court of Appeals of Georgia.

86 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Georgia, Florida and Alabama Railway Company and the Blish Milling Company wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their

validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;
or wherein any title, right, privilege, or immunity was claimed
87 under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Georgia, Florida and Alabama Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of September, in the year of our Lord one thousand nine hundred and fourteen.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by:
RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgia.

Filed in office September 26, 1914. Logan Bleckley, Clerk, Court of Appeals of Georgia.

88 No. —. Supreme Court of the United States. October Term, 191–. — vs. —. Writ of Error.

89 UNITED STATES OF AMERICA, *ss:*

To the Blish Milling Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Georgia wherein Georgia, Florida and Alabama Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be,

why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard B. Russell, Chief Judge of the Court of Appeals of the State of Georgia, this 26th day of September, in the year of our Lord one thousand nine hundred and fourteen.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals of the State of Georgia.

89½ Due and legal service of the within citation hereby acknowledged and copy received. All other and further service hereby waived. This 26th day of September, 1914.

R. G. HARTSFIELD,
ERLE M. DONALDSON,
Attorney- for Blish Milling Company.

Filed in office September 26, 1914. Logan Bleckley, Clerk, Court of Appeals of Georgia.

90 In the Court of Appeals of the State of Georgia.

GEORGIA, FLORIDA AND ALABAMA RAILWAY COMPANY
versus
BLISH MILLING COMPANY.

The Clerk, in making out a transcript for the writ of error to the Supreme Court of the United States in the above entitled cause, will please include the following parts of the record:

1. The original petition, together with the exhibits thereto;
2. The demurrer of the defendant in the court below, and the judgment of the court overruling the same;
3. The exceptions pendente lite to the judgment of the court overruling the demurrer;
4. The plea and answer and amended plea;
5. The plea in bar;
6. The verdict of the jury;
7. The judgment on the verdict;
8. The motion for new trial and amendment;
9. The brief of evidence;
10. The charge of the court;
11. The order refusing a new trial;
12. The bill of exceptions;
13. The opinion of the Court of Appeals;
14. The judgment of the Court of Appeals;
15. Petition for writ of error;
16. Order allowing writ of error;
17. Assignments of error;

18. Bond;
19. Original writ of error;
20. Original citation, with acknowledgment of service thereon.

T. S. HAWES,
ALEXANDER AKERMAN,
Attorneys for Plaintiff in Error.

Due and Legal service of the foregoing præcipe hereby
91 acknowledged and copy received.
This 26th day of September, 1914.

R. G. HARTSFIELD,
ERLE M. DONALDSON,
Attorneys for the Blish Milling Company.

Filed in office September 26, 1914. Logan Bleckley, Clerk, Court of Appeals of Georgia.

92 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, October 23, 1914.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of Georgia, Florida and Alabama Railway Company v. Blish Milling Company, which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 24,450. Georgia Court of Appeals. Term No. 706. The Georgia, Florida & Alabama Railway Company, plaintiff in error, vs. Blish Milling Company. Filed November 27th, 1914. File No. 24,450.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted]292

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BLISH MILLING COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

T. S. HAWES, Bainbridge, Ga.
ALEXANDER AKERMAN, Macon, Ga.
CHARLES AKERMAN, Macon, Ga.
Attorneys for Plaintiff in Error.

(24,450)

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 706.

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BLISH MILLING COMPANY.
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On May 13th, 1910, the Blish Milling Company delivered to the Baltimore & Ohio Southwestern Railroad Company, at Seymour, Indiana, a carload of flour consigned to itself at Bainbridge, Georgia, order notify Draper-Garrett Grocery Company, Bainbridge, Georgia, specifying the routing, which routing made the Georgia, Florida & Alabama Railway Company, the Plaintiff in Error, the delivering carrier. The flour arrived at its destination on June 2nd, 1910. Somewhere in the route, the exact place not appearing defi-

nitely from the record, the flour became wet, presumably from a defective car, and at Atlanta, Georgia, before it reached the line of the delivering carrier, it was transferred from the original car into another car. When the flour reached its destination, the car containing it was switched to the private track of the Draper-Garrett Grocery Company without the surrender of the bill of lading, and the Draper-Garrett Grocery Company began to unload it, and, after a partial unloading of the car, discovered that the flour had been damaged in transit, and immediately reloaded the flour and refused to accept it. The delivering carrier, the Plaintiff in Error, notified the Blish Milling Company by wire of such refusal, and asked instructions as to the disposition of the car. The Blish Milling Company refused to give any instructions as to the flour, and the wet part of it, being perishable, was immediately sold by the Plaintiff in Error, and the remainder held, and finally sold for the payment of the freight charges. Both sales being in conformity with the Georgia Statute regulating the disposal of refused freight. On February 25th, 1913, the Blish Milling Company filed in the City Court of Bainbridge, Georgia, a suit against the delivering carrier, the Plaintiff in Error, for the full value of the flour, reciting in paragraph two of its petition the execution and delivery of the bill of lading by the Baltimore & Ohio Southwestern Railway Company at Seymour, Indiana, and attaching to its declaration a copy of said bill of lading, which, among other things, contained the following stipulations:

> "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery, or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery then, within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

Among other defenses in this suit urged and specially pleaded in the trial court were the following, which we contend clearly present Federal questions for determination by this Court:

1st. The shipment of freight being an interstate shipment, the remedy of the holder of the bill of lading was against the initial carrier, the Baltimore & Ohio Southwestern Railway Company, under the Carmack Amendment to Section 20 of the Hepburn Bill, and such remedy was exclusive.

2nd. That no claim having been filed as far as the record shows for the loss or damage to the shipment with the carrier either at the point of origin or at the point of destination within four months from a reasonable time for the delivery of the shipment, the claim was barred under the stipulation above quoted in the bill of lading. Upon the trial of the case the bill of lading was proved and introduced in evidence by the plaintiff in the court below, and a verdict was returned in favor of the plaintiff. The defendant in the court below, Plaintiff in Error here, filed its motion for new trial in accordance with the practice in the State of Georgia, which motion was overruled. Whereupon it sued out its writ of error to the Court of Appeals of the State of Georgia, in which Court the verdict and judg-

ment of the court below, with a slight modification, was approved, whereupon the Plaintiff in Error brought the case to this Court by writ of error, the Court of Appeals of the State of Georgia being the highest Court in said State with jurisdiction to review said verdict and judgment.

ASSIGNMENTS OF ERROR.

1. The Court erred in affirming the judgment of the City Court of Bainbridge overruling the demurrer to the petition of the plaintiff, wherein it was urged that the petition showed that the City Court was without jurisdiction of the subject matter of the cause, thereby holding and deciding that the cause of action of the plaintiff in the lower Court was not exclusively against the Baltimore & Ohio Southwestern Railway Company, as the initial carrier, under what is commonly known as the Carmack Amendment to Section Twenty of the Hepburn Bill.

2. The Court erred in affirming the judgment of the City Court of Bainbridge overruling the demurrer to the petition of the plaintiff in the Court below, wherein it was claimed that the plaintiff's right of action was barred by reason of the following stipulation in the bill of lading, to-wit:

> "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; unless claims are so made, the carrier shall not be liable."

Thereby holding and deciding that the right of action of the plaintiff in the Court below, if any it had, was not one arising under the Act of Congress, approved February 4th, 1887, entitled, "An Act to Regulate Commerce," and the several Acts of Congress amendatory of said Act, and therefore that plaintiff's right of action was not barred under said stipulation in the bill of lading, the form of said bill of lading having been approved by the Interstate Commerce Commission of the United States.

3. The Court erred in affirming the judgment of the City Court of Bainbridge, denying the motion for new trial, and thereby holding and deciding that plaintiff's right of action was not barred by reason of failure of the plaintiff in the Court below to make claim for loss and damage, in writing, to the carrier at the point of delivery, or at the point of origin, within four months after a reasonable time for delivery had elapsed, the interstate bill of lading, issued under a form approved by the Interstate Commerce Commission, expressly providing that in case of failure to make such claim in writing the carrier should not be liable.

4. The Court erred in holding and deciding that the right of action of the plaintiff, the Blish Milling Company, was not under what is commonly known as the Carmack Amendment of Section Twenty of the Hepburn Bill, exclusively against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company.

5. The Court erred in holding and deciding that, in a movement of an interstate shipment of freight over the lines of connecting carriers, plaintiff's right of action for an alleged wrongful delivery of the freight

was not one arising exclusively under the laws of the United States, and that plaintiff in said City Court of Bainbridge was not barred under the laws of the United States by reason of plaintiff's failure to present a claim in writing to the carrier at the point of delivery, or at the point of origin, within four months after the delivery, or within four months after a reasonable time for delivery.

BRIEF OF THE ARGUMENT.

The assignments of error, five in number, in reality present two questions:

1st. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of Section Twenty of the Hepburn Bill.

2nd. That under the stipulation in the bill of lading providing for the filing of claims for loss or damage the action was barred.

I.

This Court has held that the remedy provided by the Carmack Amendment to Section Twenty of the Hepburn Bill against the initial carrier is exclusive.

> Adams Express Company vs. Croninger, 226 U. S., 491.

The Court of Appeals of Georgia in the case of Southern Railway vs. Bennett, decided September 23rd, 1915, and reported in 86 Southeastern Reporter, page 418, in the third headnote says:

"The action being one against the last connecting carrier, to recover for damage to an interstate shipment, a motion to dismiss it upon the ground that the Federal regulation contained in the Hepburn Act and the Carmack Amendment thereto, is paramount and exclusive of State regulation, and that under the Federal statute the initial carrier alone is liable for any loss, damage, or injury to the shipment caused by any transportation company over whose line the shipment might have passed, should have been sustained."

II.

This Court has decided that stipulations in interstate bills of lading limiting the time in which suits shall be filed are valid.

Missouri, Kansas & Texas Ry. Co. vs. Harriman, 227 U. S., 657.

It has also been held that stipulations that a carrier shall not be liable unless claim is filed in a specified period are valid.

The Southern Express Co. vs. Caldwell, 21 Wall, 264; 22 Law Edition, 556;
Central Vermont R. Co. vs. Soper, 8 C.C.A., 341.

It has been held that a limitation of liability made by initial carrier will inure to the benefit of any succeeding carrier sued for the loss or damage.

Kansas City Southern Ry. Co. vs. Carl, 227 U. S., 639, 57 Law Edition, 683.

The Court of Appeals of the State of Georgia recognizes the rule above laid down, but refused to apply it when invoked by the Plaintiff in Error, for the reason that this was a suit in trover for the conversion of goods, and not a suit founded on the bill of lading; but we respectfully contend that the plaintiff in the Court below in a suit where it declared upon the bill of lading, attached the bill of lading as an exhibit to its declaration and introduced the bill of lading in evidence in order to make out its case, cannot by a mere shifting of its form of action evade stipulations in the bill of lading which have been held to be legal and binding by this Court.

The Federal Statute does not provide the measure of damages, and there is no reason why a suit in trover could not be filed under the Federal Statute, unless it should be held that the rule of damage in trover cases, that is, the highest proved value between the date of conversion and trial, would open the gate to rebating, by enabling the carrier to technically convert a car of freight and pay the owner more than its value at the time of the conversion.

The case of J. C. Shaffer & Co. vs. Chicago, Rock Island & Pacific Ry. Co., 21 I.C.C. Reports, page 8, was a claim for conversion, and the Commission, on page 9, says:

> "The defendant does not deny its liability for the conversion of the car, the only matter at issue being the measure of damages. The complainant contends that it is entitled to the value of the car of wheat at Chicago, as evidenced by the market price it was compelled to pay to fill its con-

tract. The defendant takes the position that by reason of a provision in the bill of lading, signed by the shipper and agent of the Company, the measure of damages is the invoice price of the wheat, namely, ninety-nine and one-half cents per bushel."

On page 13 the Commission says:

"This provision of the statute does not undertake to determine how such a loss or injury shall be ascertained, and the contract in this case does not attempt to relieve the carrier from the payment of the full value of the property. It simply determines the time, place, and manner in which that value shall be definitely ascertained.

"It has been repeatedly held that a provision of the character of the one in question is not regarded as a limitation of the carrier's liability, and it is reasonable in its nature."

In the Shaffer case, supra, the Railway Company had converted the car of wheat, and the question at issue was, whether the complainant could collect the market value of the wheat at destination, or whether it was bound by the conditions of the bill of lading that the invoice price should control. The Commission held that the complainant was bound by the conditions of the bill of lading. Of course, if the ruling of the Court of Appeals of Georgia is correct, then the condition of the bill of lading as to the value of the shipment at the point of origin, would not control, as all conditions of the bill of lading became null and void upon the carrier's converting the goods.

The Court of Appeals of Georgia in this case, Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Co.,

15 Ga. App., page 142, takes the position that the bill of lading was valid when issued, but that the Railway Company having converted the shipment, the contract, or bill of lading, was abandoned and was therefore void, and the Federal law became superseded by the State regulations, Chief Judge Russell, on page 149, using this language:

> "But, according to the allegations of the petition, the contract was abandoned and repudiated by the defendant; and the defendant could not thereafter insist upon the stipulation in the bill of lading as to the time when such claims for damage should be presented. Merchants & Miners Transportation Co. vs. Moore, 124 Ga., 482 (52 S. E., 802)."

And on page 151:

> "If the Railway Company's abandonment or repudiation of the contract did not terminate or annul it, it must be because there is some difference between a contract of carriage and other contracts which we are unable to see. It is true the conversion was technical, but it was a breach of the contract; and it is fundamental that if one party breaches the contract the other party is released."

This decision is subject to the criticism that a bill of lading is not a voluntary contract; it is a duty imposed by law upon the carrier. It is true the carriers are permitted to put on the bill of lading certain conditions, but when those conditions are lawfully placed thereon they are as binding in law upon both the shipper and the carrier as is the bill of lading itself.

The main purpose and effect of the Carmack Amendment was to provide a uniform rule as to the liability of interstate carriers of goods to relieve them from diverse rules to which they had been heretofore subjected, and to supersede all the regulations and policies of a particular State upon the subject.

Spader vs. Pennsylvania R. Co., 92 Atl., 379 and 380.

The carriers are required by law to issue bills of lading, and are permitted to attach certain conditions thereto. If the carrier, by a technical conversion, can abandon the bill of lading and make it null and void, then the effect of the Carmack Amendment is lost.

If it should be held that a technical conversion by a carrier terminates and annuls the bill of lading, then the different States could construe the meaning of the conversion and, by passing laws defining conversion, soon make it impossible to uphold any bill of lading, and its issuance would become an unnecessary expense.

If the placing of a loaded car on a sidetrack is a technical conversion, and makes the bill of lading void, why could not the State Legislatures declare negligently damaging a shipment, or negligently losing a part thereof, or delaying delivery beyond a reasonable time a technical conversion? Thereby leaving the validity of every bill of lading to be determined upon the laws of the particular State in which the controversy arises. This is practically the condition in Georgia at this time. The Court of Appeals of Georgia, in the case of Nashville, C. & St. L. Ry. vs. C. V.

Truitt Co., decided September 25th, 1915, and reported in 86 Southeastern Reporter, page 421, in the fourth headnote holds that if the negligence which occasioned the loss was wanton or wilful the carrier could not insist upon the conditions of the bill of lading. This decision classes gross negligence or wanton or wilful negligence along with conversion and holds that the jury must say whether the negligence was gross, wanton or wilful.

The Carmack Amendment does not provide that a bill of lading shall become null, nor that its conditions shall become void, if there is a conversion by the carrier, and we respectfully insist that as Congress requires the carriers to issue bills of lading, State Courts are without authority to declare them void, unless so authorized by Congress.

The provision of the bill of lading was sufficiently full to cover this case. It provided, "Claims for loss, damage, or delay must be made in writing . . . . Unless claims are so made the carrier shall not be liable." If the property was converted it was certainly a loss, and, if it was a loss, claim must be filed in writing within four months, and if not filed within that time, "the carrier shall not be liable." It is admitted that no claim was filed. This Court, in the case of Adams Express Co. vs. Croninger, 226 U. S., 491, on page 508, in referring to the liability of a connecting carrier, uses this language:

> "The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been liable."

It could not be contended that the first carrier could have been liable in this instance unless the claim for loss, damage, or delay had been filed in compliance with the conditions of the bill of lading, and if the first carrier could not have been liable, then, under the statement above quoted, the Plaintiff in Error could not have been liable.

Paragraph ten of the plaintiff's petition shows that all costs in the case of the Blish Milling Company against the Georgia, Florida & Alabama Railway Company, which was filed on the 14th day of February, 1911, have been paid. Beyond the foregoing statement, there is not the slightest claim in the record that any claim for loss or damage had been filed prior to the filing of the present suit on the 25th day of February, 1913. The record shows conclusively that the shipment arrived at Bainbridge on the 2nd day of June, 1910, and that the plaintiff in the Court below had knowledge that the shipment had been refused on June 7th, 1910. Therefore, we will assume that June 7th, 1910, would have been a reasonable time for delivery of the shipment of freight, and admitting for the sake of argument that the institution of the previous suit, which was filed February 14th, 1911, was a claim for loss or damage, the record shows no claim filed either at the point of origin or at the point of destination for the loss or damage to the freight for a period of more than eight months after a reasonable time for the delivery.

Therefore, we respectfully contend that the suit was barred by the stipulations in the bill of lading, and

that the Court of Appeals of Georgia erred in the rulings complained of in the Exceptions of Plaintiff in Error.

Respectfully submitted,

T. S. HAWES,
ALEXANDER AKERMAN,
CHARLES AKERMAN,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 292.

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY,
Plaintiff in Error,

vs.

BLISH MILLING COMPANY,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

T. S. HAWES, Bainbridge, Ga.
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CHARLES AKERMAN, Macon, Ga.
Attorneys for Plaintiff in Error.

(24,450)

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 292.

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY,

Plaintiff in Error,

vs.

BLISH MILLING COMPANY,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error contends in its brief that no Federal question is involved in this case. The plaintiff in error contended in the trial court, and in the Georgia Court of Appeals, that the remedy provided by the Carmack Amendment to Section 20 of the Hepburn Bill was exclusively against the initial carrier, and that the plaintiff's action was barred by the stipulations in the interstate bill of lading (Record, 13, 14, 34, 36, 43, 44).

Thus Federal questions were clearly raised and these questions were decided adversely to the plaintiff in error by the Georgia Court of Appeals, (Record, 31, 34, 36).

A party who unsuccessfully relies in the State Courts upon an Act of Congress as a defense is entitled to bring the case up to the Federal Supreme Court by writ of error.

Sage vs. Hampe, 235 U. S., 99,
59 Law Ed., 147.

A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States, may be fairly held to assert a right and immunity under such statutes.

Nutt vs. Knut, 200 U. S., 12,
50 Law Ed., 348.

A Federal question must be deemed to have been raised in the State courts with sufficient definiteness to comply with the provisions of the Judicial Code, § 237, where it appears from the opinion of the State Supreme Court that a question under the Constitution of the United States was treated as sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error.

Mallinckrodt Chemical Works vs. Missouri,
238 U. S., 41,
59 Law Ed., 1192.

In the following cases the Supreme Court has recently held that a Federal question was sufficiently raised:

North Carolina R. Co. vs. Zachary, 232 U.S., 248,
58 Law Ed., 591,
Louisiana Ry. & Navigation Co. vs. Behrman,
235 U. S., 164,

59 Law Ed., 175.
Lesser vs. Gray, 236 U. S., 70,
59 Law Ed., 471.
Coe vs. Armour Fertilizer Works, 237 U.S., 413,
59 Law Ed., 1027,
Cumberland Glass Mfg. Co. vs. DeWitt, 237 U. S., 447,
59 Law Ed., 1042.

The defendant in error contends in its brief that a written claim was made in accordance with the provisions of the bill of lading. This contention, however, is not borne out by the record. The Court of Appeals finds: "So far as appears from the record, no claim was filed by the shipper." (Record, 34.)

In the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. vs. Dettlebach, decided by this Court on January 10th, 1916, it was held that all service performed by a railroad company, whether as carrier or as warehouseman, is controlled by the stipulations contained in the uniform bill of lading issued by the initial carrier in view of the provisions of the Hepburn Act of June 29th, 1906, and we contend that in view of this decision and those cited in the original brief, the stipulation in the bill of lading was effective, and that plaintiff's action was barred, because no claim in writing was filed by the shipper as required in this bill of lading.

Respectfully submitted,
T. S. HAWES,
ALEXANDER AKERMAN,
CHARLES AKERMAN,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 292

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY,
Plaintiff in Error,

vs.

BLISH MILLING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

E. M. DONALSON,
Attorney for Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 706.

THE GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY,

Plaintiff in Error,

vs.

BLISH MILLING COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The Blish Milling Company, at Seymour, Indiana, shipped to Bainbridge, Georgia, consigned to itself, a carload of flour. The bill-of-lading was sent to one of the local banks in Bainbridge with a sight draft attached for the value of the flour with instructions to notify the Draper-Garrett Grocery Company. The flour arrived in Bainbridge over the line of the Georgia, Florida & Alabama Railway Company, which received the same from its connecting carrier in accordance with the routing, and was delivered by the Georgia, Florida & Alabama Railway Company to the

Draper-Garrett Grocery Company without requiring the Draper-Garrett Grocery Company to pay the sight draft and surrender the bill-of-lading, thus ignoring and violating the instructions contained in the bill-of-lading, and causing a conversion of the flour by said railway company. For this conversion the Blish Milling Company brought a suit in trover against the Georgia, Florida & Alabama Railway Company, which resulted in a verdict and judgment for the plaintiff. The case was then appealed to the Court of Appeals of the State of Georgia, where the judgment of the court below was affirmed. A writ of error was then granted by the Chief Judge of the Georgia Court of Appeals, on which the case is now pending in the Supreme Court of the United States. Plaintiff in error urges that the judgment of the Georgia Court should be reversed for two reasons:

1st. That the exclusive remedy of the Blish Milling Company was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of Section Twenty of the Hepburn Bill.

2nd. That under the stipulation in the bill of lading providing for the filing of claims for loss or damage the action was barred.

BRIEF OF THE LAW AND ARGUMENT.

I.

No Federal Question Involved.

The Georgia, Florida & Alabama Railway Company was not sued as a carrier for loss of the flour or damage to the same, under the contract of carriage, as

contained in the bill-of-lading, but was sued in trover for a conversion of this property, after the contract of shipment had been repudiated and abandoned by the carrier. The Blish Milling Company had the right to regard the contract as abandoned and sue for the conversion in trover. No Federal question was involved under this cause of action.

> "Where one ships goods to his own order, the delivery of the goods by the carrier to another without the production of the bill-of-lading covering the shipment of goods, is a delivery made at the risk of the carrier, and subjects him to a suit in trover for conversion."
>
> Boatmanmens Savings Bank v. W. & A. R. R. Co., 81 Ga. Supreme Court Reports, 223.
>
> Northern Penn. R. R. Co. v. Commercial National Bank of Chicago, 123 U. S., page 727.
>
> Southern Ry. Co. v. Strozier & Waters, 10 Ga. Appeals Reports, 157.
>
> Merchant & Miners Trans. Co. v. Moore & Co., 124 Georgia Supreme Court Reports, 482.
>
> Hobbs & Tucker v. Chicago Packing and Provision Co., 98 Georgia Supreme Court Reports, 576.

This being a suit in trover for a conversion, and not on the contract of interstate shipment contained in the bill-of-lading, which was not construed by the Georgia Court, **We submit that the judgment of the Court of Appeals of Georgia rested on grounds not involving what is known as the Carmack Amendment to the Hepburn Bill, or any other Federal question, and for this reason the writ of error can not be maintained.**

The decision of the Georgia Court in this case, contained in the 15th volume of the Georgia Appeals Reports, page 142, clearly shows that no Federal question was involved or construed. The Supreme Court of the United States has in a similar case decided the question involved here and held that the judgment of the State Court was not reviewable. I quote the headnote in the case of Arkansas Southern Railroad Company and George C. Griffith v. German National Bank, 207 U. S., 270, 52 L. Ed., 201:

> "A judgment of a State Court against a carrier for the value of a shipment of cotton which it delivered without the surrender of the bills of lading is not reviewable in the Supreme Court of the United States although the State Court refers to and upholds, over an objection of repugnancy to the Federal Constitution, a State statute forbidding delivery under such circumstances, where the Court treats the contract of shipment itself as requiring a delivery to shipper's order, and only upon the production of the bills of lading, properly indorsed."

To give the Supreme Court of the United State's jurisdiction of a writ of error to a State Court, it must affirmatively appear that a Federal question was presented for decision by the State Court; that it was decided there; that a decision of this Federal question was necessary to the determination of the cause; and, that it was decided adversely to the party claiming a right under the same.

> Isabel B. Eustis, et al., Ex'rs, v. Charles H. Bolles, et al., 150 U. S., 361, 37 L. Ed., 1111.

Vandalia Railroad Company v. State of Indiana Ex Rel. City of South Bend, 207 U. S., 359, 52 L. Ed., 246.

New Orleans and North Eastern Railroad Company and Southern Railway Company v. National Rice Milling Company, 234 U. S., 80, 58 L. Ed., 1223.

Garr, Scott & Co. v. O. K. Shannon, 223 U. S., 468, 56 L. Ed., 510.

The Georgia Court of Appeals in deciding this case expressly disclaimed any intention of deciding any Federal question. No interstate question was involved. The tort was voluntary and committed solely in the State of Georgia, and had no connection with the contract of shipment. The Blish Milling Company based its claim on the common law action of Trover. In deciding the Arkansas Southern Railroad Company case, supra, the Supreme Court of the United States said: "Therefore, if we should be of opinion, as we are, that the Supreme Court (Arkansas), rested its judgment upon principles of common law as it understood them, we should go no farther."

We submit that this entire decision, and the other decisions cited in the same connection are directly in point, and are controlling.

II.

ANY ONE OF CONNECTING CARRIERS, THAT COMMITS THE WRONG, IS LIABLE, AS WELL AS THE INITIAL CARRIER.

The plaintiff in error contends that the exclusive remedy of the Blish Milling Company was against the initial carrier, the Baltimore & Ohio Southwestern

Railroad Company. As previously stated, we do not believe that the Carmack Amendment to the Hepburn Bill is applicable to this case. This act of Congress was not construed by the Georgia Court, nor was a construction of the act necessary. We did not sue for loss or damage, but even so, we do not understand that there is any provision in the said Carmack Amendment exempting the terminal carrier, or any other carrier, from liability for loss or damage to an interstate shipment of goods:

> "The Carmack Amendment (Act June 29, 1906, c. 3591, Section 7, pars. 11, 12, 34, Stat. 595, U. S. Comp. St. 1913, Section 8592) of Interstate Commerce Act, Feb. 4, 1887, c. 104, Sec. 20, 24 Stat. 386, rendering an initial carrier liable for loss or damage sustained over its own line or that of a connecting carrier, did not relieve the terminal carrier from liability for injuries to animals shipped in interstate commerce sustained while the animals were in its possession" . . . . "By plain expression that law makes the initial carrier liable for a loss or damage; it does not exempt from liability expressly or by implication the terminal carrier, or any other." Eastover Mule & Horse Co. v. Atlantic Coast Line Railroad Company, 83 S. E., 599. Decided by Supreme Court of South Carolina. Elliott vs. Chicago M. & St. P. Ry. Co., 150 N. W., 777, Decided by Supreme Court of South Dakota. Bichlmeir v. Minneapolis St. P. & S. S. M. Ry. Co., 150 N. W., 508, Decided by Supreme Court of Wisconsin.
>
> Atchison T. & S. F. Rv. Co., et al. vs. Boyce, et al., 171 S. W., 1094, Decided by Court of Civil Appeals of Texas.

Under the peculiar facts of the instant case, it is doubtful whether there was any liability on the part of the initial carrier.

> "An initial carrier is not liable as a carrier for an interstate shipment over lines of connecting carriers, where the goods were held at their destination by the last carrier as a warehouseman, after a reasonable time for their removal had elapsed subsequent to the mailing of the notice of their arrival in accordance with Code Sec. 6137." Louisville & Nashville R. Co. v. Brewer, 62 Southern Reporter, 698, Decided by Supreme Court of Alabama.

III.

No Necessity to Give Notice of Claim in Writing.

The plaintiff in error further contends that under the stipulation in the bill of lading providing for the filing of claims for loss or damage the action was barred. The record shows that the flour arrived in Bainbridge on June 2nd, 1910, and on June 7, 1910, the Blish Milling Company filed a written claim against the Georgia, Florida & Alabama Railway Company, by telegram, in the following words: "We will make written claim against railroad for entire contents of car at invoice price——." (See page 23 of the record.) It would appear from this that written claim was made, but we earnestly insist that this was unnecessary. The contract of carriage, contained in the bill of lading, **was abandoned by the railway company when it converted the flour.** The carrier can not re-

pudiate the contract and then hold the shipper to its terms that a written claim must be made within a specified time for loss or damage.

> "When a carrier is guilty of a conversion resulting from a wrong delivery, he can not take advantage of a stipulation in the bill of lading which provides that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property; and if delaved for more than thirty days after delivery of the property, or after due time for the delivery thereof, no carrier shall be liable in anv event." Merchant & Miners Transportation Company v. Moore & Co., 124 Ga. Supreme Court Reports, 482.

We also refer the Court to the case of Ridgeway Grain Co. v. Penna. Ry. Co., reported in 31 L. R. A. (N. S.), page 1178. A great number of decisions are cited in the notes to this authority sustaining the proposition just announced.

In addition to this we call attention to the fact that the contract of carriage does not provide that a claim must be submitted in writing if the property is **converted** by the carrier, but only for **loss or damage.** There is a wide difference between the meaning of the word "conversion" and the meaning of the word "loss" or the meaning of the word "damage."

> Atlantic Coast Line Ry. Co. v. Goodwin, 1st Ga. Appeals Reports, 356.

The defendant railway company did not lose the flour, but simply converted it, and there was no stipu-

lation in the bill of lading demanding a written claim for a conversion. The railway company was not sued for a loss or for damage, but was sued for conversion in trover. Therefore, there was no necessity to file a written claim, for this additional reason.

IV.

By way of resume, we respectfully contend in this case that the judgment of the Georgia Court of Appeals should be affirmed because:

(1) There was no Federal question construed or decided by the Georgia Court.

(2) Even though a Federal question had been presented and construed and a construction of the same was necessary to determine the cause; (a) The remedy was not exclusively against the initial carrier; (b) The contract of carriage did not provide that the shipper must give a written notice to the carrier who abandoned the contract and converted the property, but only provided that this written notice must be given in the event of loss or damage in order to recover; (c) Though a written claim were demanded, in order to recover for a conversion, such claim was made within a few days after the railway company converted the flour.

For these reasons we contend that the judgment of the State Court should be affirmed.

Respectfully submitted,

E. M. DONALSON,
Attorney for Defendant in Error.

A.L.Miller,
of Counsel for Defendant in Error.

GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY *v.* BLISH MILLING COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 292. Argued March 15, 1916.—Decided May 8, 1916.

The bill of lading of an interstate shipment issued by the initial carrier contained a stipulation that claims for failure to make delivery must be made in writing to the carrier at point of delivery within a specified period otherwise carrier not liable; there was a delivery, but it was made contrary to instructions, and the shipper telegraphed the terminal carrier that it made claim for entire value at invoice price. *Held* that:

Under the Carmack Amendment the connecting carrier was not relieved from liability, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and fixes the obligations of all participating carriers to the extent that its terms are applicable and valid.

The question of proper construction of the bill of lading of an interstate shipment is a Federal question.

Multitudinous transactions of a carrier justify the requirement of written notice of misdeliveries of merchandise and claims against it even with respect to its own operations.

The Carmack Amendment casts upon the initial carrier responsibility with respect to the entire transportation; and in case of misdelivery by the terminal carrier the initial carrier is liable.

A provision in an interstate bill of lading is to be construed

the same as to the connecting or terminal carrier as it is to be construed as to the initial carrier, as the obligations of the latter are measured by the terms of the bill of lading.

Where the bill of lading of an interstate shipment requires notice of claim for misdelivery, such notice must be given before action can be brought against the terminal carrier making the misdelivery complained of.

The effect of such stipulation cannot be escaped by form of action; and if a suit cannot be maintained for damages against the delivering carrier without the required notice, it cannot be maintained for conversion.

Parties to the contract of an interstate shipment by rail made pursuant to the Act to Regulate Commerce cannot waive its terms; nor can the carrier by its conduct give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations.

Where a provision in a bill of lading for an interstate shipment is applicable and valid effect must be given thereto.

The stipulation in this case was satisfied by the telegram from the shipper to the terminal carrier, it appearing that there was no such variance from a claim for value of the shipment as to be misleading and no prejudice resulted; such a stipulation being addressed to a practical exigency must be construed in a practical way and does not require a particular form of notice.

15 Ga. App. 142, affirmed.

THE facts, which involve the rights and duties of carriers and shippers under the Carmack Amendment, are stated in the opinion.

Mr. T. S. Hawes, with whom *Mr. Alexander Akerman* and *Mr. Charles Akerman* were on the brief, for plaintiff in error.

Mr. A. L. Miller and *Mr. E. M. Donalson* for defendant in error submitted:

There was no Federal question construed or decided by the Georgia court.

Even though a Federal question had been presented

and construed and a construction of the same were necessary to determine the cause, the remedy was not exclusively against the initial carrier; the contract of carriage did not provide that the shipper must give a written notice to the carrier who abandoned the contract and converted the property, but only provided that this written notice must be given in the event of loss or damage in order to recover; though a written claim were demanded, in order to recover for a conversion, such claim was made within a few days after the railway company converted the flour.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Blish Milling Company brought this action in trover against the Georgia, Florida & Alabama Railway Company and recovered judgment which was affirmed by the Court of Appeals of Georgia. 15 Ga. App. 142. The facts are these:

On May 13, 1910, the Blish Milling Company shipped from Seymour, Indiana, to Bainbridge, Georgia, a carload of flour consigned to its own order with direction to notify Draper-Garrett Grocery Company at Bainbridge. The bill of lading was issued by the Baltimore & Ohio Southwestern Railroad Company. The shipper's sight draft upon the Draper-Garrett Grocery Company, for $1,109.89 covering the price of the flour with a carrying charge, was attached to the bill of lading and forwarded to a bank in Bainbridge for collection. The flour was transferred to another car by the Central of Georgia Railway Company, a connecting carrier, and reached Bainbridge on June 2, 1910, over the line of the Georgia, Florida & Alabama Railway Company, the plaintiff in error, in accordance with routing. The plaintiff in error, without requiring payment of the draft and surrender of the bill

of lading (which were ultimately returned to the Blish Milling Company), delivered the car to the Draper-Garrett Grocery Company immediately on its arrival by placing it on the side track of that company. In the course of unloading the grocery company discovered that some of the flour was wet and thereupon reloaded the part removed and returned the flour to the plaintiff in error. The subsequent course of events is thus stated by the Court of Appeals (*Id.*, pp. 144, 145):

"The railway company" (that is, the plaintiff in error) "retook possession of the car and unloaded it, and in a few days sold, as perishable property, a part of the flour alleged to be damaged, and on December 23, 1910, sold the remainder. On June 3, 1910, after the grocery company had turned the flour back to the railway company, B. C. Prince, traffic manager of the Georgia, Florida & Alabama Railway Company, telegraphed to the Blish Milling Company as follows: 'Flour order notify Draper-Garrett Grocery Company refused account damage. Hold at your risk and expense. Advise disposition.' On the next day the milling company replied by telegraphing to Prince, 'Sending our representative there. What is nature of damage?' To this Prince replied: 'Flour transferred in route. Slight damage by water, apparently rough handling. When will your representative reach Bainbridge?' The Blish Milling Company replied that their man would be there that night or the next day. On June 7 (after the milling company's representative had reached Bainbridge and conferred with the agents of the railway company and with the grocery company) the milling company sent a final telegram, saying, 'We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle.' It appears, from the evidence of Mr. Draper, that the price of flour declined after his order was given and before the flour reached Bainbridge. There

is conflict in the evidence as to a tender of the flour by the railway company to the milling company's representative. According to some of the testimony, about 18 barrels of the flour had been sold by the railway company before the alleged tender was made, and therefore it was not within the power of the carrier to tender the shipment in its entirety." The verdict in favor of the Milling Company was for $1,084.50 from which the Court of Appeals required a deduction of the amount of the unpaid freight which was held to have been erroneously included.

With other defenses, the Railway Company pleaded that the shipper had failed to comply with the following provision of the bill of lading, issued by the initial carrier: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." This defense was overruled. The Court of Appeals stated that "so far as appears from the record, no claim was filed by the shipper," but deemed the provision to be inapplicable. *Id.*, p. 149.

There are only two questions presented here, and these are thus set forth in the brief of the plaintiff in error:

"1st. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of Section Twenty of the Hepburn Bill.

"2nd. That under the stipulation in the bill of lading providing for the filing of claims for loss or damage the action was barred."

The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon

an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act." *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 648. See *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 507, 508; *C. C. & St. L. Ry.* v. *Dettlebach*, 239 U. S. 588, 591; *Southern Railway* v. *Prescott*, 240 U. S. 632, 637; *Northern Pacific Ry.* v. *Wall*, *ante*, p. 87.

These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question. The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers "failure to make delivery." It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee but actual delivery to another or delivery in violation of instructions. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on

through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 199–203; *N. Y., P. & N. R. R.* v. *Peninsula Produce Exchange*, 240 U. S. 34, 38), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims "in case of failure to make delivery" the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (*Kansas Southern*

Ry. v. *Carl, supra; Southern Railway* v. *Prescott, supra*); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid.

In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the state court said, "if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier." 15 Ga. App., p. 147. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chi. & Alt. R. R.* v. *Kirby*, 225 U. S. 153, 166; *Kansas Southern Ry.* v. *Carl, supra; A., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173, 181; *Southern Ry.* v. *Prescott, supra.* We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it.

But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation for the reason that it appears that notice

of the claim was in fact given. It is true that in the statement made by the Court of Appeals it is said that so far as appears from the record "no claim was filed by the shipper." We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted facts in detail showing that the shipper (having made an investigation in response to the communication of the traffic manager of the Railway Company) had telegraphed to the latter, on June 7, 1910, only five days after the arrival of the goods at destination, as follows: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle." In the preceding telegrams, which passed between the parties and are detailed by the state court in stating the facts, the shipment had been adequately identified, so that this final telegram taken with the others established beyond question the particular shipment to which the claim referred and was in substance the making of a claim within the meaning of the stipulation,—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim, for while it stated that the claim was for the entire contents of the car 'at invoice price' this did not constitute such a variance from the claim for the value of the flour as to be misleading; and it is plain that no prejudice resulted. Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement. See *Ryan* v. *United States*, 136 U. S. 68, 83; *Kleinhans* v. *Jones*,

68 Fed. Rep. 742, 745; *Godwin* v. *Francis*, L. R. 5 C. P. 295; *Queen* v. *Riley* [1896], 1 Q. B. 309, 314, 321; *Howley* v. *Whipple*, 48 N. H. 487, 488; *State* v. *Holmes*, 56 Iowa, 588, 590.

Judgment affirmed.